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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. When a Title VII claim improperly is tried to the court before a parallel §1983 claim is tried to a jury, the trial court's judgment for defendant (on the Title VII claim) must be vacated, to avoid collaterally estopping the jury and depriving plaintiff of her jury trial right on the §1983 claim. *Lytle* v. *Household Mfg., Inc.*, 110 S. Ct. 1331. Isn't it a necessary corollary that the Court of Appeals *cannot reverse* the Title VII verdict and enter judgment for plaintiff, thereby collaterally estopping the jury and violating *defendant's* Seventh Amendment right to jury trial of the §1983 claim?

II. When a trial court errs by entering a "forced" remittitur, instead of offering plaintiff a choice between remittitur and a new trial, does not proper appellate procedure require a *remand* so the trial court can offer plaintiff this choice, not outright *reversal* of the remittitur, which penalizes defendant for the trial court's procedural error?

III. Did the Court of Appeals err by decreeing that certain equitable remedies, prejudgment interest and front pay, are virtually mandatory in age discrimination cases, a position contrary to that of other circuits and other panels of the Sixth Circuit, who regard such remedies as discretionary under 29 U.S.C. §626(b)?

PARTIES

All parties who remain in this proceeding are listed in the caption to this petition. Several individual defendants were named in the complaint, but they have all since settled.

There are no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, filed December 11, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 917 F.2d 1391, and is included in the Appendix at pp. A-1 to A-19. The prior (now vacated) opinion of the Court of Appeals is reported at 908 F.2d 65. The order denying defendant's petition for rehearing en banc (from the prior opinion) is appended at pp. A-50 to A-51. Also appended are several orders and a memorandum of decision from the trial court, pp. A-22 to A-46.

JURISDICTION

The opinion and judgment of the court of appeals was entered on December 11, 1990. This petition for a writ of certiorari was timely filed within 90 days of the final judgment. 28 U.S.C. §2101(c); Supreme Court Rule of Practice 13.4.

The jurisdiction of this Court to review the judgment by writ of certiorari is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

This action involves claims under the ADEA, 29 U.S.C. §621, *et seq.*; §1983 of the Civil Rights Act, 42 U.S.C. §1983; and Title VII, 42 U.S.C. §2000 *et seq.* However, the only provision in those acts which must be interpreted to resolve this appeal is 29 U.S.C. §626(b), which provides for remedies of ADEA violations (emphasis added):

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of

> this Act. *In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

In addition, this appeal requires interpretation of the right to jury trial under the United States Constitution, Seventh Amendment:

> In suits at common law, where the va'ue in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, other than according to the rules of the common law.

Finally, Fed.R.Civ.P. 38(b) and (d) must be interpreted (emphasis added):

> (b) *Any party may demand a trial by jury on any issue triable of right* by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> • • •
>
> (d) Waiver. The failure of a party to serve a demand as required by the rule and to file it as

required by Rule 5(d) constitutes a waiver by the party of trial by jury. *A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.*

STATEMENT OF THE CASE

A. Facts[1]

Plaintiff-respondent Therese Farber ("plaintiff") is a female, born May 20, 1930. Since 1972 she has been employed as a teacher by defendant-petitioner Massillon Board of Education ("defendant").

In 1978 plaintiff applied for an administrative position which included principalship of the Lincoln Elementary School. The Board considered plaintiff but ultimately awarded the position to Robert Otte, a more qualified male who had greater seniority (henceforth, this personnel decision shall be referred to as the "1978 decision," and claims based on this personnel action as the "1978 claims").

In the summer of 1980 plaintiff applied for another administrative post, this time Director of Instruction. She was one of 30-35 candidates interviewed, and became one of four finalists. Ultimately, though, the Board selected James Gides, a male younger than plaintiff, as the best qualified candidate (henceforth the "1980 decision" and "1980 claims").

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[1] Defendant is *not* asking this Court to review factual determinations made below. Rather, defendant requests that the Court address several purely legal errors (mostly procedural) committed by the Court of Appeals. Therefore, this statement of facts will be very brief.

B. Proceedings In The Trial Court

On April 15, 1982, plaintiff filed this lawsuit. She challenged both the 1978 and 1980 decisions as gender-based, asserting sex discrimination claims under Title VII (42 U.S.C. §2000 *et seq.*) and the Civil Rights Act, 42 U.S.C. §1983. She also filed a claim under the Age Discrimination in Employment Act ("ADEA", 29 U.S.C. §621 *et seq.*), charging that the 1980 decision was unlawfully motivated by considerations of age.

1. The Age Discrimination Claim

Before addressing the sex discrimination claims, the trial court tried the ADEA claim to a jury, which found for plaintiff and awarded backpay damages of $76,383. Several pertinent post-trial motions ensued.

Defendant moved for a new trial or in the alternative a remittitur. The court agreed that no reasonable juror could have found damages above $38,817.36, and so granted defendant's motion. (Memorandum of Opinion, September 8, 1986, App. pp. A-24, A-39 to A-41). Unfortunately, the court committed a procedural error, failing to offer plaintiff the choice between a remitted award and a new trial. By order dated September 8, 1986, it simply entered a "forced" remittitur. (App. p. A-22).

Plaintiff filed a post-trial motion for prejudgment interest on the jury award. The trial court denied it as untimely filed under Fed.R.Civ.P. 59(e), never indicating whether it otherwise would have granted the motion on the merits. (Order dated October 13, 1987, App. pp. A-42, A-43).

Plaintiff also moved for equitable relief, either appointment or front pay, to supplement the jury's backpay award. The trial court denied both requests.

(Order dated Oct. 13, 1987, App. pp. A-42 to A-44). As to appointment, it found that "distrust, suspicion and hostility" between plaintiff and other Massillon administrators make a productive working relationship impossible. The court also declined to make a purely speculative front pay award, noting that plaintiff never proved she would have gotten more than a one year contract as Director of Instruction, and the backpay award already compensated her for five years in that position.

2. The Sex Discrimination Claims

The trial court then turned its attention to the §1983 sex discrimination claims, which challenge both the 1978 and 1980 decisions. By order dated September 8, 1986, the court dismissed *both* §1983 claims as barred by Ohio's one year statute of limitations for intentional torts. Ohio Revised Code §2305.11. Thus, neither §1983 claim was tried to a jury. (App. pp. A-22, A-23).

Finally, the court held a bench trial on the two Title VII claims, after which it found for defendant on both. This judgment was entered on September 8, 1986. (App. pp. A-22, A-23).

C. Proceedings In The Court Of Appeals: The July 12 Decision

1. The ADEA Claim

Defendant did not appeal from the jury verdict, but plaintiff appealed all three post-trial rulings described above. The court reversed the remittitur on two grounds, one procedural and one substantive. Procedurally, it found error in the "forced" nature of the remittitur, then held that such procedural error requires

reversal of the remittitur, not simply a remand.[2] Substantively, it concluded that the jury's $76,383 award was not outside the range of proofs, and so reversed on this ground too.

As to prejudgment interest, the court ruled that plaintiff's motion was timely filed, overturning the ground on which the motion was denied below. Again, though, the court did not just remand for the trial court to decide whether *any* prejudgment interest award is appropriate here, taking into account various equitable considerations. Instead, the appeals court reversed and remanded only for calculation of the *amount* of prejudgment interest, declaring that prejudgment interest "*will* be allowed" whenever requested in ADEA cases. (App. p. A-17) (emphasis added).

Turning to other equitable remedies, the court vacated the denial of appointment, remanding with instructions to hold a new evidentiary hearing on compatibility. More significantly, it effectively instructed the trial court that it must award either appointment or front pay, warning that "front pay is a remedy presumed appropriate" when appointment (or reinstatement) is denied. (App. p. A-8). Accordingly, without carefully examining the trial court's reasons for denying front pay, the appeals court vacated this ruling and remanded it for reconsideration.

2. The §1983 Sex Discrimination Claims

While this appeal was pending, the U.S. Supreme Court rendered its decision in *Owens v. Okure*, 488 U.S. 235 (1989), holding that federal courts must borrow a state's general statute of limitations for §1983 actions.

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[2] "[A] forced remittitur ... constitutes error, requiring this court to reverse and reinstate the verdict." (App. p. A-5).

On this basis, the Court of Appeals correctly held that the trial court should have applied Ohio's two year catchall statute, Ohio Revised Code §2305.10, not its one year intentional tort statute, §2305.11.

However, the court then held that *both* §1983 claims were "timely" filed, including the 1978 claim, even though plaintiff filed her complaint in 1982, 4 years after that cause of action arose! Defendant moved the court to reconsider en banc this obviously incorrect ruling, at which point plaintiff filed a brief *expressly conceding* that her 1978 claim was untimely:

> Appellant admits that since she filed her Complaint regarding the denials of her Section 1983 rights on April 15, 1982, she would not presently be able to seek separate redress for the denial by the appellee-board of her civil rights in 1978.

(Appellant's Response To Appellees' Motion For Rehearing En Banc, filed Sept. 11, 1990, App. p. A-47). This made no difference to the court, which *denied* the motion for rehearing en banc. (Order dated Sept. 28, 1990, App. pp. A-50, A-51).

Finally, the court rejected an alternative theory on which defendant supported dismissal of both §1983 claims. Defendant argued that the Title VII claims already were adjudicated, and those bench verdicts collaterally estop a jury from finding sex discrimination in parallel §1983 actions. The court disagreed, based on *Lytle v. Household Manufacturing, Inc.*, 110 S.Ct. 1331, 108 L.Ed. 2d 504 (1990), another case decided while this appeal was pending. *Lytle* requires that the Title VII judgments be vacated in such circumstances, precisely to avoid the above-described collateral estoppel effect.

3. The Title VII Sex Discrimination Claims

The Court of Appeals reviewed the record evidence and reversed the trial court's judgment, directing that verdicts for plaintiff be entered on both the 1978 and 1980 claims. The appeals court disregarded the record in so holding, but defendant does not ask this Court to review these rulings, one of which is moot anyway. (*See* discussion pp. 11-15, *infra*.).

4. Defendant's Motion For Rehearing En Banc

On July 26, 1990, defendant timely petitioned the Sixth Circuit to rehear several of the above issues en banc. Specifically, defendant requested rehearing regarding: (1) the mandate that prejudgment interest must be awarded, not just considered; (2) the reversal of judgment for defendant on the 1978 §1983 claim, which was time-barred under the properly applicable statute of limitations; (3) the outright reversal of the remittitur, instead of a remand; and (4) the reversal of the Title VII judgments for defendant.

The court ordered plaintiff to respond to defendant's argument that the 1978 claim is time-barred by the applicable statute of limitations. As set forth above, plaintiff responded by *admitting* that defendant is correct on this point. Nonetheless, the court denied defendant's petition in its entirety. (Order dated Sept. 28, 1990, App. pp. A-50, A-51).

5. The December 11, 1990 Judgment And Opinion, Vacating The Prior July 12 Decision.

On December 11, 1990, after defendant had filed a petition for certiorari, the Court of Appeals *sua sponte* vacated its July 12 judgment. The Court issued a new judgment and an amended opinion. (Order dated De-

cember 11, 1990, App. pp. A-20, A-21). The December 11 judgment expressly states, "The judgment of this court in this case entered July 12, 1990 is hereby vacated." (App. p. A-21).

The amended opinion *affirms* the trial court's holding that the 1978 §1983 claim is time-barred, in contrast to the July 12 decision, which had reversed and remanded this claim. In all other respects the December 11 opinion is identical to its July 12 counterpart.

D. Defendant's Original Petition For Certiorari (From The Subsequently-Vacated July 12 Judgment)

Defendant petitioned for a writ of certiorari from the July 12, 1990 judgment.[3] While that petition was pending, the Court of Appeals *sua sponte* vacated its July 12 judgment, as discussed above.

By vacating the July 12 order, the Court of Appeals eliminated this Court's jurisdiction to consider defendant's petition from *that* judgment. Plaintiff so advised this Court, in a brief devoted solely to the jurisdictional point.[4] Defendant did not oppose plaintiff's jurisdictional argument, which clearly was correct.

On February 19, 1990, this Court entered an order denying defendant's original petition. The order does not state whether the denial was for lack of jurisdiction

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[3] (Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit, Case No. 90-620) (cover page, questions presented and table of contents appended at App. pp. A-50 to A-52).

[4] (Respondent's Brief In Opposition, Case No. 90-620) (cover page and questions presented appended at App. pp. A-55 to A-56).

or otherwise. Defendant attempted to clarify the grounds through the Clerk of Courts' office, but was informed there is no mechanism for doing so. Defense counsel must assume the original petition was denied for lack of jurisdiction; obviously, this Court could not grant certiorari to review an already-vacated decision.

Defendant timely filed the present petition, which seeks a writ of certiorari from the December 11, 1990 judgment. This is defendant's first petition from *that* judgment; the former petition addressed only the now-vacated July 12 judgment.

REASONS FOR GRANTING THE WRIT

I. Under *Lytle*, Reversing The Title VII Judgment And Entering Judgment For Plaintiff On The 1980 Claim, Instead Of Simply Vacating The Title VII Judgment, Violates Defendant's Seventh Amendment Right To A Jury Trial.

This argument presents an important federal Constitutional question, one of first impression for this or any other court. At the trial level, the procedural posture of this case was indistinguishable from that in *Lytle v. Household Manufacturing, Inc.*, 110 S.Ct. 1331 (1990).[5] However, the appellate court's reversal presents a mirror image of *Lytle*; the issues are the same, but the parties now are on opposite sides. That poses a question for this Court: does *Lytle* still apply in the mirror image situation? Defendant submits it must.

In *Lytle*, this Court was concerned with protecting a plaintiff's right to jury trial of his §1981 action. The district court erroneously dismissed that claim before

[5] Defendant attempted to distinguish *Lytle*, but the Court of Appeals rejected defendant's argument.

trial. It then held a bench trial on a Title VII claim that arose out of the same events, finding for defendant. Plaintiff appealed, and the Fourth Circuit agreed that dismissal of the §1981 claim was improper. However, it declined to remand, reasoning that the judgment under Title VII collaterally estopped a jury from finding in plaintiff's favor under §1981. The Supreme Court reversed, because applying the collateral estoppel doctrine in such circumstances violates a plaintiff's Seventh Amendment right to a jury trial. *Lytle*, 108 L.Ed. 2d at 517. Further, the Court held that the *Title VII judgment must be vacated*:

> Vacating the District Court's determination regarding Lytle's Title VII claims is required to afford Lytle complete and consistent relief. Had his §1981 claims not been dismissed, the jury's determination of legal and factual issues could not have been disregarded when the District Court considered his equitable claims. Moreover, vacating the District Court's judgment avoids the possibility of inconsistent determinations.

Lytle, 108 L.Ed. 2d at 518 n. 4.

The present case was identical to *Lytle* until the Sixth Circuit reversed the Title VII judgment on the merits. Now it is defendant, not plaintiff, who potentially is collaterally estopped and injured by losing the opportunity to have a jury try the §1983 claim. [6]

But *Lytle* prohibits such a result, dictating that the Title VII judgment be vacated. The reasoning in the quoted passage applies equally whether the right in question belongs to a plaintiff or a defendant. Civil

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[6] Obviously, this argument applies only to the 1980 claim. The 1978 claim under §1983 is time-barred and properly was dismissed before trial.

defendants have the same right to a jury trial as civil plaintiffs. *See* Fed.R.Civ.P. 38(b) ("Any party may demand a trial by jury"). *See also* discussion infra., p. 14.

Here, but for the trial court's erroneous dismissal of the §1983 claim, that claim would have been tried to a jury before the Title VII claim was tried to the court. The jury's findings would have bound the trial judge (and court of appeals) under collateral estoppel principles. Further, if the §1983 claim is remanded and a jury finds for defendant, there will be inconsistent verdicts. Or, if the Title VII judgment is accorded preclusive effect, no jury ever will hear the §1983 claim. Every factor listed in the passage quoted from *Lytle* applies just as forcefully when defendant, instead of plaintiff, loses the Title VII claim.

Granted, in both cases the "erroneous" dismissal resulted from a motion filed by the defendant, not the plaintiff. Plaintiff thus may argue that *Lytle* protects only parties "not responsible" for the original erroneous dismissal. But that argument misses the mark, at least in this case.

Defendant moved the trial court to apply what, at the time, was clear and controlling Sixth Circuit precedent regarding the applicable statute of limitations. *Mulligan v. Hazard*, 777 F.2d 340, 344 (6th Cir. 1985) ("we hold that the one year limitations period contained in §2305.11 governs Mulligan's [§1983] actions"). The trial court complied, as it was bound to do. Subsequently, this Supreme Court overruled *Mulligan*, rendering the trial court's reliance on it "erroneous." (*Supra*, pp. 7-8). Surely defendant cannot be blamed for failing to foresee that development. If anyone is "responsible" for the error below, it is the Sixth Circuit, whose decision in *Mulligan* turned out to be wrong.

Plaintiff also may argue it was she, not defendant, who demanded a jury trial. But that argument carries no weight. Once demanded by either party, both parties have a right to a jury trial; defendant is not required to file a duplicative jury trial demand. Such is the clear import of Fed.R.Civ.P. 38(d), which states that once any party makes a jury demand, the demand cannot be withdrawn unless all parties consent:

> Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such a demand is withheld in reliance upon a demand filed by another party.

De Pinto v. Provident Security Life Ins. Co., 323 F.2d 826, 832 (9th Cir. 1963), *cert. den.* 376 U.S. 950 (1964). *See also In re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982); *Rosen v. Dick*, 639 F.2d 82 (2nd Cir. 1980); 5 *Moore's Federal Practice* §38.45 ("if a timely and proper demand for jury is made, all other parties in the litigation who are effected by the demand may rely thereon and need not make a jury demand for issues embraced therein").

Finally, plaintiff may argue that defendant's position conflicts with the position it took below; *i.e.*, that *Lytle* does not apply here because the trial court's ruling was not really "erroneous."[7] However, the court of appeals rejected defendant's position, then failed to consistently apply *its own* ruling. Put another way, the court of appeals held *Lytle* applicable, but then applied only half of *Lytle*. It applied the half which says a Title

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[7] For obvious reasons, at that time it was to defendant's advantage for the Title VII judgment to be upheld and given preclusive effect, while plaintiff argued against such a result. Now, *both sides* have reversed their positions.

VII judgment lacks collateral estoppel effect, but ignored the second holding, which says the Title VII judgment *must* be vacated. *Lytle*, 108 L.Ed. 2d at 517-18. That is clear error. Either *Lytle* is completely inapplicable, or both aspects of its holding govern here. Defendant submits the latter is correct, so the Title VII judgment must be vacated.

II. When A Trial Court Procedurally Errs By Entering A "Forced" Remittitur, Proper Appellate Procedure Requires A Remand, Not A Reversal.

The trial court erred by failing to give plaintiff a choice between a new trial and a remittitur. The obvious way to correct such an error is by vacating and remanding, with instructions that plaintiff be given the required choice:

> Where a remittitur is ordered without offering the prevailing party the option of a new trial, we must remand to allow him to "exercise his rights of choice by requesting a new trial in lieu of the remittitur."

Matherne v. Wilson, 851 F.2d 752, 762 (5th Cir. 1988) (dicta).

There is a split both among the circuits and within the Sixth Circuit on this question of appellate procedure. *Compare Matherne, supra;* and *May v. Ellis Trucking Co., Inc.*, 243 F.2d 526, 527 (6th Cir. 1957) (when district court erred by entering forced remittitur, appellate court remands for plaintiff to be given option); with *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969, 974 (2nd Cir. 1975) (court suggests remand may be better procedure, but nonetheless reverses and reinstates jury verdict due to "minimal" amount at issue); and *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974) (reversing

and reinstating jury award due to trial court's procedural error). This Court should resolve the split by establishing a rule requiring remand as the proper appellate remedy.

To reverse and reinstate the jury's award, as the court of appeals did, penalizes defendant for the trial court's mistake. Defendant cited the correct procedure (offering plaintiff a choice) to the trial court,[8] and when that court nonetheless erred, plaintiff easily could have filed a motion requesting that she be given an option. Instead she remained silent. She should not benefit from her studied silence, nor should defendant be penalized for the trial court's procedural mistake.

Appellate relief should restore parties to where they would have been had no error occurred in the trial court. That objective is accomplished by remanding the case, to give plaintiff the choice she should have had in the first place. But it is frustrated by a flat reversal, which puts plaintiff in a significantly better position than she would have occupied had the trial court not made a procedural error.

Moreover, the appellate court's error was prejudicial, despite its alternative holding that the remittitur was substantively unwarranted. Had proper procedure been followed (*either* by the trial court or by the court of appeals), plaintiff might have opted to take the remittitur, rather than risk losing everything in a new trial. Had plaintiff accepted the remittitur, she would not have been able to appeal it. *Donovan v. Penn Ship-*

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[8] "The court may, on its own motion, condition the denial of a new trial upon plaintiff's acceptance of a remittitur." (Defendant's Motion For Judgment Notwithstanding The Verdict Or In The Alternative For New Trial Or Remittitur, filed December 23, 1985, p. 12).

ping Co, Inc., 429 U.S. 648, 649 (1977).[9] Thus, had proper procedure been followed, the remittitur might have been immune from challenge on appeal. By reviewing the merits of the remittitur, before plaintiff had to make a choice that could have precluded her from challenging it, the court of appeals clearly erred to defendant's prejudice.[10]

There is only one way to restore the parties to where they should have been, had the trial court followed proper procedure. The trial court's entry of remittitur should be vacated and remanded, with instructions to offer plaintiff the requisite choice. Further, the appellate ruling on the substantive merits of the remittitur must be vacated, so plaintiff makes her choice without the assurance that if she rejects the remittitur, it will be reversed on appeal. If plaintiff rejects the remittitur, then she can appeal it (after the new trial), at which point an appeals court will revisit the issue *de novo*. If plaintiff accepts the remittitur, the matter will be closed.

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[9] "The Court of Appeals properly followed our precedents in holding that a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal. A long line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed." *Donovan*, 429 U.S. at 649.

[10] If this Court grants certiorari, defendant also intends to argue, in the alternative, that prejudice occurred because the court of appeals erred in finding the remittitur unsupported by the record. But that argument requires review of the factual record, and need not occupy this Court's time in deciding whether to grant certiorari.

III. In ADEA Actions, The Decision To Grant Or Deny Equitable Remedies, Such As Prejudgment Interest And Front Pay, Is Committed To The Discretion Of The Trial Court; Such Remedies Are Not Mandatory.

This issue presents an important federal question regarding remedies available under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Prior to the decision below, the consensus view of appellate courts was that equitable remedies, such as prejudgment interest and front pay, are *options* a trial court may grant or deny in its *discretion*. But the decision below declares these remedies are mandatory, creating a circuit split and effecting a dramatic change in ADEA law. This Court should resolve the split (*see* Sup. Ct. Rule 10.1(a)) by endorsing the long established rule that trial courts have discretion in fashioning equitable remedies under the ADEA.

A. Prejudgment Interest

The trial court denied plaintiff's motion for prejudgment interest as untimely filed. The court of appeals reversed this ruling, a decision from which defendant does not appeal. However, the appellate court did not simply remand for the trial court to consider, in the first instance, the merits of plaintiff's request. Instead, it directed that prejudgment interest must be awarded, remanding only for calculation of the amount. (*Supra*, pp. 6-7). That is not, and should not be, the law.

The ADEA's remedial provision, 29 U.S.C. §626(b), provides: "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act." This provision clearly grants district courts *discretion* to fashion "appropriate" relief, it does not mandate that any particular remedy be

employed. *McMahon* v. *Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1079 (6th Cir. 1989) (affirming denial of prejudgment interest in ADEA case: "whether to award prejudgment interest is within the discretion of the district judge"); *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) (affirming denial of prejudgment interest, expressly rejecting argument that "prejudgment interest may be presumptively due in ADEA cases"); *Castle* v. *Sangamo Weston, Inc.*, 837 F.2d 1550, 1563 (11th Cir. 1988) ("decision whether to grant equitable relief, and, if granted, what form it shall take, lies in the discretion of the district court").

Here, several equitable factors weigh against awarding prejudgment interest. First and foremost, defendant is a public school district board of education. An award of interest against defendant may impair its ability to provide quality education to thousands of innocent students. *See EEOC* v. *Rath Packing Co.*, 787 F.2d 318, 333-34 (8th Cir. 1986) (affirming denial of prejudgment interest in Title VII claim because such award could adversely impact many of defendant's innocent employees). Other equitable factors include whether plaintiff already has been fully compensated by the jury award, *MacDissi*, *supra*, and whether defendant is at fault for the long delay between filing of the complaint and entry of judgment. *Osterneck* v. *E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987) (affirming limits imposed on prejudgment interest in SEC case).

The district court should at least be given a chance to weigh these considerations, an opportunity the appellate order denies it. This Court should hold that the order below was inconsistent with §626(b)'s grant of discretion to district courts.

B. Front Pay

The trial court denied plaintiff's motion for appointment to the position the jury found she was unlawfully denied, and also denied her alternative motion for a front pay award. The court of appeals remanded both rulings for reconsideration, and in providing guidance for the trial court on remand, further instructed that when appointment (or, in some cases, reinstatement) is denied, "front pay is a remedy presumed appropriate." (App. p. A-8). This statement does not comport with the law under 29 U.S.C. §626(b), nor in discrimination cases generally.

As supposed support for its position, the court of appeals cited just one case, *Davis* v. *Combustion Engineering*, 742 F.2d 916 (6th Cir. 1984). *Davis*, however, categorically rejects the view for which the panel below cited it:

> "Front pay" does not appear to lend itself to a per se rule. It is neither mandatory nor prohibited by the Act. Rather, it is but one of a broad range of remedies available under the ADEA.

Davis, 742 F.2d at 922-23. *Davis* then adopts precisely the position defendant urges here, that "an award of front pay must be governed by the sound discretion of the trial court and may not be appropriate in all cases." *Id.* at 923. How the court of appeals could cite *Davis* as creating a "presumption" favoring front pay is a total mystery.

Other circuits concur that front pay is not always appropriate, even when appointment or reinstatement is denied:

> Based on our survey of the other circuits and the factors we delineated in *Loeb*, 600 F.2d 1003, we adopt the following front pay rule. Future damages

> should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case.

Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (affirming denial of front pay in ADEA claim). *See also Brooms v. Regal Tube Co.*, 881 F.2d 412, 424 n. 9 (7th Cir. 1989) (affirming denial of front pay award in Title VII claim). This Court should endorse the consensus view of the United States Courts of Appeals and affirm the trial court's discretion to deny front pay.

CONCLUSION

The Court should grant certiorari in this matter. The Court of Appeals departed from accepted principles of appellate procedure, created a circuit split by ignoring established precedent, and violated defendant's Constitutional right to a jury trial. Those are compelling reasons for this Court to exercise its power of discretionary review.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 87-4035/89-3456

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THERESE A. FARBER,
Plaintiff-Appellant,
v.
MASSILLON BOARD OF EDUCATION,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed July 12, 1990

Before: KEITH and KRUPANSKY, Circuit Judges; and TAYLOR, District Judge.*

TAYLOR, District Judge. The first of these two consolidated appeals is of Appellant's claims that the Massillon Board of Education (and certain individuals not parties here) discriminatorily denied her promotional appointment to two positions on the basis of her age and her sex. The second consolidated appeal concerns attorney fees. For the reasons discussed below, we reverse and remand for further proceedings consistent herewith.

* Honorable Anna Diggs Taylor, U.S. District Judge, Eastern District of Michigan, Southern Division, sitting by designation.

Appelant, who was born in 1930 and holds a Master's Degree in educational administration, taught in several parochial schools, was principal of a parochial school for six years, and holds numerous certificates including those of teacher and provisional elementary principal, as well as numerous commendations for her teaching skills. She began teaching in the Massillon school district in 1972. By 1978 Appellant had a total of 27 years of experience in teaching grades 1-8, the last six of which were in the Massillon system. She also coordinated, directed, and taught in the Massillon Adult Basic Education Program (ABE).

In 1978, Appellant applied for the newly vacant combined position of Principal of Lincoln Elementary, Director of ABE, and Director of the Title I Remedial Reading Program. Superintendent Louis Young rejected her application in favor of Robert Otte, a male teacher, and Appellant thereafter filed a complaint of sex discrimination with the U.S. Equal Employment Opportunity Commission (EEOC).

Superintendent Young resigned because of illness in 1980. Darnell Cheyney, Director of Instruction, was appointed Interim Superintendent and was therefore required to fill the vacancy he had left in the Director's post. Of at least thirty-two candidates for that job, only two were female and one of those was Appellant. She became one of four finalists in the competition, but ultimately lost to a younger male, James Gides.

Appellant filed another complaint with EEOC, alleging sex and age discrimination. In due course, EEOC issued Right-To-Sue Letters, and Appellant filed this action. Her complaint below charged two counts of sex discrimination in violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. §2000 *et seq.*; two counts of sex discrimination in violation of 42 U.S.C. §1983; and one count under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Other claims were included, but subsequently withdrawn.

The trial court dismissed Appellant's two §1983 claims prior to trial, for having been filed beyond the statute of limitations. It then tried the Age Discrimination Act claim to a jury, which awarded Appellant damages of $76,383.00. After trial, the court remitted the damage award to $38,817.36, on Appellee's motion, and denied Appellant's motion for either front pay or appointment to the position wrongfully denied. Thereafter, it held a bench trial on Appellant's two Title VII claims and rendered judgment on both for defendants. This appeal is from each of those rulings, and the second appeal complains of the amount of attorney fees awarded Appellant for her successful prosecution of the ADEA claim.

Remittitur

The district court granted Appellee's post-trial motion to remit the jury verdict for Appellant's ADEA back pay loss, finding the evidence insufficient to support the jury's award. Appellant was given no opportunity, moreover, to opt for a new trial in lieu of the remittitur. She contends that both the remittitur itself, as well as the failure to offer an alternative thereto were erroneous, and we agree.

As a general rule, this court has held that "a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's

loss." *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983); *Jones v. Wittenberg University*, 534 F.2d 1203, 1212 (6th Cir. 1976).

A trial court is within its discretion in remitting a verdict only when, after reviewing all evidence in the light most favorable to the awardee, it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the conscience of the court. *Jones v. Wittenberg University, supra; Hines v. Smith*, 270 F.2d 132 (6th Cir.), *cert. denied*, 255 U.S. 576 (1921). If there is any credible evidence to support a verdict, it should not be set aside. *Wertham Bag Co. v. Agnew*, 202 F.2d 119 (6th Cir. 1953). The trial court may not substitute its judgment or credibility determinations for those of the jury. Moreover, it abuses its discretion in ordering either a remittitur or new trial when the amount of the verdict turns upon conflicting evidence and the credibility of witnesses. *Hewitt v. B. F. Goodrich*, 732 F.2d 1554 (11th Cir. 1984); *Cross v. Thompson*, 298 F.2d 186 (6th Cir. 1962); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967), *cert. denied*, 389 U.S. 913 (1967).

When examined in light of the settled law outlined above, the remittitur in this case will not pass muster. The damages which the jury awarded were the exact amount which Appellant had testified were the maximum due her. Under such circumstances, they should not be disturbed by the court. *U.S. v. 329.73 Acres*, 66 F.2d 281 (5th Cir. 1982). Although evidence was conflicting, the jury apparently chose to give full credit to Appellant's testimony that she could serve both as Director and teacher in the ABE program, and her evidence that she would have been compensated, if

appointed Director in 1980, at the tenth and highest level of the salary scale. Although Appellee presented evidence to the contrary on both points, we note that the district court itself stated, during trial, that the level of pay scale which Appellant would have attained was "a jury question," because "there is evidence in the record from which the jury could draw" the conclusion that she would have started at level ten. There was, indeed, sufficient evidence to support the jury's verdict, and remitting it constituted an abuse of discretion, under the circumstances.

Moreover, even if remittitur had been appropriate here, a forced remittitur without the offer of the option of a new trial on the issue of damages constitutes error, requiring this court to reverse and reinstate the verdict. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974); *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2d Cir. 1975).

Appointment or Front Pay

After Appellant's success before the jury on her ADEA legal claim, she applied to the district court for equitable relief as authorized by §7(b) of that statute, 29 U.S.C. §626(b). The courts have been charged by that section to be mindful of the statutory intent of "... recreating the circumstances that would have existed but for the illegal discrimination." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982). On such a petition, the district court is to be mindful of the admonition of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L.Ed 2d 280 (1975), and its numerous progeny, that equitable relief is to "... be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of

eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. Accordingly, a district court must carefully articulate its rationale for refusing to compel employment of a plaintiff who has suffered discrimination.

The basis upon which reinstatements, or an appointment in this case, may be denied must be more compelling than the personal preferences and distrusts which accompanied the initial discriminatory activity. "It is not enough that reinstatement might have 'disturbing consequences,' that it might revive old antagonisms, or that it could 'breed difficult working conditions' [because] [r]elief is not restricted to that which will be pleasing and free of irritation." *In re Lewis v. Sears, Roebuck & Co.*, 845 F.2d 624, 630. (6th Cir. 1988). The district court, on such petition, is of course bound by the jury's decision of the issue of prior discrimination.

Such exceptional circumstances as would justify denial of Appellant's petition should be found only upon the facts presently obtaining and not based upon historical circumstances which may no longer be present when the proposed reinstatement occurs. *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276 (8th Cir. 1983). For that reason, an evidentiary hearing as to the present circumstances of the parties is appropriate where, as here, the passage of time since trial has been substantial. In this case, the ADEA trial was completed on December 13, 1985, and the district court decided the petition for appointment on October 13, 1987. Moreover, where a petition is denied on the basis of workplace tensions,

those tensions must be so serious as to manifest themselves in the public function of the employer. *Id.*

Here the district court offered the following rationale for denial of appointment, approximately two years after the close of evidence:

> "... the evidence ... clearly established that there has been an atmosphere of distrust, suspicion and hostility existing in the relationship between the plaintiff and the administrators ... such that the granting of plaintiff's motion ... would have a negative effect upon the operation of that office and would be inappropriate."

The court has failed to provide the "carefully articulate(d) ... rationale" required by *Dickerson*, *supra*, and the reasons given are unsupported by such meagre material evidence as the record contains, despite Appellant's two requests for an evidentiary hearing on appointment. The trial record does not support a finding that distrust and hostility were established, and the "administrators" are not named. The position of Director had been filled for yet a second time during the pendency of Appellant's case (and without her being granted an interview). Not only had Superintendent Young resigned, but so had his successor, Cheyney, by the time of the ruling. The determination against appointment must be reversed and remanded for proceedings consonant herewith.

Front Pay

Appellant's request for front pay as an alternative to appointment, either until she could be appointed to the next available administrative position to become vacant,

or to the next vacancy in the Director of Instruction position, was held to be inappropriate and speculative, "... particularly in light of the lack of evidence that any central office contract to which plaintiff might have been a party would have been for any period in excess of a year." The court further found that the jury's damage award had sufficed to make plaintiff whole, although it remitted that award by half. The basis of the denial is not further explained, although front pay is a remedy presumed appropriate unless record evidence clearly demonstrates the contrary. *Davis v. Combustion Engineering*, 742 F.2d 916 (6th Cir. 1984). This determination must also be reversed for reconsideration, as an alternative to appointment.

Title VII Claim re 1978 Appointment

It must be stated at the outset, with regard to Title VII, that the district court correctly determined that Appellant had failed to prove her claim of systemic sex discrimination, there having been no evidence of the size of the pool of eligible female candidates for the positions sought.

Appellant, whose qualifications are described *supra*, began submitting annual written requests for promotion to the Massillon system administration in 1973. Notices were not posted of the several vacancies which occurred through 1976, and they were filled by the Superintendent's suggestion that the person whom he desired, always male, submit an application. In 1977, Appellant learned that Superintendent Young planned to interview Robert Otte, a 30-year-old male teacher, for appointment to an unposted vacancy as Interim Principal of Lincoln Elementary (which included the additional

duties of Director of Title I and of ABE). Appellant then applied and was also interviewed by Superintendent and Director of Instruction Cheyney. By a later agreement, Appellant accepted the position of Interim Director of ABE, and Otte was given the Interim Principalship.

In the summer of 1978 it became clear that the former Lincoln Principal would not return to duty, and that a permanent replacement must be made.

The parties stipulated at trial that the Board's minimum qualifications applicable in 1978 for the Lincoln Principalship (*et al.*) position were stated at §2.370 of the Board Policy Handbook as revised in 1977. The Handbook announced a minimum requirement of ten years of prior teaching experience, and no requirement of seniority within the system, whatsoever. Appellant was fully qualified.

Mr. Otte had a total of eight years of teaching experience, all in the sixth grade within the Massillon system. He also possessed the one year of administrative experience obtained through his interim appointment, but had no prior experience in ABE, Title I, or any other federal program. He failed to meet the minimum qualifications of the Board Handbook.

On May 23, 1978, the administration posted a notice of the vacancy in the Lincoln Principalship, including a set of minimum qualifications which differed from the Board Handbook in requiring only four years of teaching experience. This was the first vacancy posted since 1972.

Superintendent Young later said that he had chosen Otte for the combined position because, although he found both candidates relatively equal in qualification,

Otte had greater seniority in the system. The trial court, on bench trial of the Title VII claims, also found that both candidates met the minimum qualifications (those posted in May of 1978), and that Appellee's explanation concerning Otte's greater system seniority rebutted any presumption of discrimination. The court later found the record "devoid of evidence" in support of Appellant's claim of sex discrimination in the 1978 promotion.

Pursuant to Fed. R. Civ. P. 52(a), a district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See also, Anderson v. Bessemer City*, 470 U.S. 564, 566, 105 S. Ct. 1504, 84 L.Ed. 2d 518 (1985); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1015 (6th Cir. 1987). "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent. . . [a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, at 573, *citing, U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 2d 746 (1948).

In a Title VII action, plaintiff bears the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. The defendant must then come forward with a legitimate non-discriminatory reason for its action, after which the plaintiff bears the burden of proving that the proffered reason is pretextual. *Texas Dep't of Community Affairs vs. Burdine*, 450 U.S. 248, 252, 101 S. Ct. 1089, 67 L.Ed. 2d 207 (1981); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989).

The district court in this case has clearly erred in its finding that Appellant failed to prove that the reasons proffered for selecting Otte over her were pretextual. Those reasons were that the parties both met minimum qualifications and that Otte was more highly qualified because of his seniority.

On the stipulated evidence, Otte lacked the minimal qualifications for the position (for lack of ten years of teaching), and was only rendered qualified by the reduced qualifications posted by the administration when the vacancy was announced. This was done knowing that Otte and Appellant were the candidates, and after Otte had already been chosen interim incumbent. Moreover, system seniority was not a qualification announced either by the Board Handbook or the administration's posting. It was, however, the only possible measure, however irrelevant, by which Otte might outdistance Appellant, and was cited by the Superintendent after the fact when his decision was challenged. The reasons offered are transparently pretextual, and appear to have been tailored to the needs of the occasion. Neither Appellee nor the district court has presented any examination of the validity of those putative criteria upon which the decision allegedly was made, and no rational basis presents itself from the record. They cannot, on their face, be called legitimate non-discriminatory reasons for an otherwise discriminatory decision.

It appears, therefore, that clear error has occurred, and the decision against Appellant's Title VII claim concerning the 1978 promotion must be reversed.

Title VII Claim re 1980 Appointment

In 1980, appellant sought a promotion to the position of Director of Instruction when Director Cheyney became Superintendent. She was again denied appointment in favor of a young man, James Gides. According to the Board and Superintendent Cheyney, Gides was selected "because of subjective reasons" and because he "met the minimum established qualifications." The district court accepted these reasons as legitimate and nondiscriminatory and determined that Appellant had failed to make out a prima facie case of sex discrimination with regard to the Director's position. Because the district court's findings of fact were clearly erroneous, we reverse and remand with instructions that such relief as appropriate under Title VII which has not otherwise been awarded, be awarded.

The Board's written policy regarding the Director's position undisputedly required that the appointee possess a minimum of five years of teaching experience and two years of administrative experience. Appellant easily met those requirements, and Gides did not. Gides had only three years of teaching experience prior to his appointment as an Assistant Principal at Lorin Andrews Junior High School in 1974.

Appellee successfully argued below that, even though Gides may not have met the stated requirements for the position, he was nevertheless more qualified than Appellant. The reasoning was that Superintendent Cheyney had felt that Gides' administrative experience (which had been gained because of his rapid advancement under Young and Cheyney) more than compensated for his lack of teaching experience and that there was a "chemistry" between himself and Gides which

would be beneficial to their working relationship. The Board voted to hire Gides on the recommendation of Superintendent Cheyney. Furthermore, Board members Thomas Caples and Janice Crofut testified that neither they nor any other member of the Board were aware of the requirements for the Director's position nor did they consciously decide to ignore them. They simply accepted the Superintendent's recommendation.

The district court's finding that Gides met the minimum stated requirements for the position, and that the Board had waived its standing qualifications was clearly erroneous. Appellant established a prima facie case which the Board could not rebut with a legitimate non-discriminatory reason for its decision. The use of subjective criteria is permissible in the selection of management positions. However, "[t]he ultimate issue in each case is whether the subjective criteria were used to disguise discriminatory action." *Grano v. Department of Development of the City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983), *citing, Ramirez v. Hofheinz*, 619 F.2d 442, 446 (5th Cir. 1980). In the instant case, two primary factors convince us that the alleged use of subjective criteria was merely a poor disguise for discriminatory action by the Board.

First, as has already been shown, Gides failed to meet the minimum stated qualifications for the position. The subjective criteria were not utilized to distinguish among peers, but to favor an unqualified person, discriminatorily.

Secondly, although Appellant's evidence was insufficient to prove systemic sex discrimination, certainly part of Gides' favorable "chemistry" was the fact that no female administrator had ever been appointed in the

Massillon system. Implicit in Gides' selection by the Superintendent was the unacceptable preference for maintaining the continuity of an all-male administration. No other non-discriminatory explanation of the subjective reasons or desired chemistry was offered, and no closer scrutiny given by the court below.

The decision of Appellant's Title VII claim on the 1980 promotion fails to meet this court's standards requiring close analysis of subjective criteria as enunciated in *Shacke v. Southworth*, 521 F.2d 51, 55-56 (6th Cir. 1975); *Tye v. Board of Education, Polaris District*, 811 F.2d 315 (6th Cir.), *cert. denied*, 484 U.S. 924 108 S.Ct. 285, 98 L.Ed. 2d 245 (1987); *Senter v. General Motors Corp.*, 532 F.2d 511, 528-529 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). The decision of this claim is reversed.

Claims Under 42 U.S.C. §1983

Appellant's section 1983 claims were dismissed by the trial court as having been filed outside of the applicable statute of limitations. This is a matter of law subject to *de novo* review by this court. *Taylor and Gaskin, Inc. v. Chris-Craft Industries*, 732 F.2d 1273, 1277 (6th Cir. 1984).

Appellee concedes that the Supreme Court's recent decision in *Owens v. Okure*, __ U.S. __, 109 S.Ct. 573, 102 L.Ed. 2d 594 (1989), should be applied retroactively. Therefore, the general Ohio statute of limitations for actions for bodily injuries, rather than the intentional tort statute, is to be applied. Ohio Revised Code §2305.10 accordingly allows two years from accrual for filing of a claim under 42 U.S.C. §1983, thus, Appellant's 1980 claim for the position of Director of Instruction was timely filed. Her 1978 principalship claim, however,

having been filed In April, 1982, is barred by the applicable statute of limitations. The only question then left for our consideration is whether, as the Board also argues, Appellant is now collaterally estopped from bringing the 1980 §1983 claim by the district court's interim bench trial and determination of her Title VII claims on the same facts.

In essence, the Board's argument is that even if the section 1983 claim was timely filed, its dismissal by the district court is harmless error because Appellant is now precluded by the improper dismissal from bringing the claim by the doctrine of collateral estoppel.[1] The Board contends that the issues involved in Appellant's section 1983 claim were addressed and resolved during the Title VII action tried to the court, and that therefore Appellant is now bound by the district court's findings in that action. Those findings, of course, have now been reversed.

The Board's argument raises the question of whether the district court's erroneous findings in the Title VII action can preclude Appellant from a subsequent jury trial on her section 1983 claim. It is beyond purview that a judge hearing a Title VII claim based upon the same operative facts as previously tried by a jury in an identical section 1983 action would be bound by the jury's determination of liability. *Gutzwiller* v.

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[1] "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979), *citing, Parklane Hosiery Co. v. Shore*, 439 U.S. 322 n.5, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979).

Fenik, 860 F.2d 1317 (6th Cir. 1988). Although the situation here is reversed, the Board nevertheless contends that the outcome should be the same. Acceptance of this proposition, however, would result in an abrogation of Appellant's Seventh Amendment right to a jury trial on her legal claim.

Until recently, there had been differing views among the federal circuits as to the effect of collateral estoppel in this situation. *See e.g., Ritter v. Mount. St. Mary's College*, 814 F.2d 986 (4th Cir. 1986), *cert. denied*, 484 U.S. 913, 108 S.Ct. 260, 98 L.Ed. 2d 217 (1987) (holding that legal claims could be collaterally estopped even though the trial court's findings in the equitable action were erroneous and remanded) and *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (holding that plaintiff was not bound by trial court's erroneous findings on her equitable claims).

The Board urges us to adopt the reasoning of the Fourth Circuit in *Ritter* and apply collateral estoppel to Appellant's section 1983 claim whereas Appellant argues that the Seventh Circuit's decision in *Volk* should be our guide. The Supreme Court's recent decision, however, in *Lytle v. Household Manufacturing, Inc.*, __ U.S. __, __ S.Ct. __, 1990 U.S.L.W. 4341 is dispositive of this issue.

The factual situation in *Lytle* is similar to that presented in this case. The trial court erroneously dismissed the plaintiff's legal claims prior to trial and then denied her Title VII claims in a bench trial. On appeal, the Fourth Circuit reversed the dismissal of the legal claims but held that plaintiff was estopped from retrying them and was bound by the trial court's factual determinations. In reversing the Fourth Circuit and remanding for further proceedings, the Supreme Court said that

"[o]ur conclusion is consistent with this court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues. In such cases, we have never accorded collateral-estoppel effect to the trial court's factual determinations. Instead, we have reversed and remanded each case in its entirety for a trial before a jury. *See Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963)." *Id.* at __. No less is required here.

The court went on to say further that "[w]e decline to extend *Parklane Hosiery Co., supra*, and to accord collateral-estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously desmissed the legal claims. To hold otherwise would seriously undermine a plaintiff's right to a jury trial under the Seventh Amendment." *Id.* at __. We further note that the error committed here was not harmless, as Appellee argues, because this court has now reversed the findings and conclusions of the trial court against Appellant on her Title VII claims.

For these reasons, we hold that Appellant is not barred from trying her section 1983 claim to a jury. That claim is therefore remanded for trial.

Prejudgment Interest on Verdict

Pursuant to Fed. R. Civ. P. 54(c), prejudgment interest will be allowed as part of the final judgment where a request for same is made in the complaint. *Shearson/American Express, Inc. v. Mann*, 814 F.2d 301, 307 (6th Cir. 1987). Such awarding of prejudgment interest "on backpay awards [has] become reasonably

common." *EEOC v. Wooster Brush Co.*, 727 F.2d 566, 578 (6th Cir. 1984).

The jury returned a verdict in favor of Appellant on December 13, 1985, and it was reduced to judgment on the same day. The bench trial regarding the Title VII claims was then held at the end of that month. On January 10, 1986, ten days after the conclusion of the Title VII trial, Appellant filed several motions seeking further relief, among them a motion for prejudgment interest. In denying the requests, the trial court stated that:

> [because it had] been filed more than ten (10) days after the entry of judgment in the ADEA action, (it) is barred by Rule 59(e) of the Fed. R. Civ. P. and is therefore denied. *Goodman v. Hueblein*, 682 F.2d 44 (2nd Cir. 1982).

The trial court's finding that the request was untimely is erroneous. The request for prejudgment interest was made in the complaint in accordance with *Mann, supra*. Moreover, it appears that the judgment on the ADEA claim was not contemplated by the parties or the court to be the final judgment. In its September 8, 1986 opinion, the district court noted that both the court and counsel had agreed that a single judgment covering both the ADEA and Title VII claims would be issued when both had been decided. Appellant was entitled to rely upon that agreement and understanding. Moreover, the request had been made in the complaint, as required.

Appellant's claim for prejudgment interest is remanded for recalculation after entry of final judgment on all claims of this case.

Attorney Fees

Appellant complains that the district court abused its discretion by reducing her requested attorney's fees. The district court correctly noted, however, that "[t]here are repeated instances in the time summaries in which the entire amount of time expended is attributed to each or at least several of the categories of claims." The allocation of the full two hours of the initial consultation to each of the three categories to which Appellant has apportioned her time is but one example of several repetitive billings.

Based on these facts and our reversal on the other issues in this matter, we order that the issue of attorney's fees be remanded to the district court for recalculation.

Finally, it was brought to our attention during oral argument that Appellant had filed an emergency petition for interim attorney's fees, on the basis of counsel's extreme personal hardship, which the district court has yet to set for a hearing. In light of this successful appeal, the petition shall be amended accordingly, and on remand the district court shall entertain and decide the petition for interim fees forthwith.

This matter is, for the reasons discussed above, REVERSED and REMANDED for further proceedings.

APENDIX

Order of the Court of Appeals for the Sixth Circuit

FILED
DEC 11 1990

Nos. 87-4035/89-3456

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THERESE A. FARBER,
Plaintiffs-Appellants,

v.

MASSILLON BOARD OF EDUCATION,
Defendants-Appellees

} ORDER

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and TAYLOR, District Judge*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio,

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

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* The Honorable Anna Diggs-Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

The judgment of this court in this case entered July 12, 1990 is hereby vacated and the mandate issued October 10, 1990 is hereby recalled.

ON CONSIDERATION WHEREOF, it is now here ORDERED and ADJUDGED by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for further proceedings in accordance with the revised opinion filed by this court on 12/11, 1990. The costs are to be awarded to the appellant in the amounts ordered in the vacated judgment as follows:

Filing fee		$210.00
Printing		$688.30
	TOTAL	$898.30

The clerk is directed to issue a new mandate and distribute the revised opinion to the parties as expeditiously as possible.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN

Leonard Green, Clerk

FILED
1986 SEP -8 PH 2:02
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERESE A. FARBER,
Plaintiff,

v.

MASSILLON BOARD OF EDUCATION, *et al.*,
Defendants

Case No. C82-1039

Judge Alice M. Batchelder

ORDER

This matter having come on for trial by jury before this Court on plaintiff's claim of age discrimination under 29 U.S.C. §§621 *et seq.*, and trial before the Bench on plaintiff's claim of sex discrimination under 42 U.S.C. §§2000 *et seq.*, and a judgment having been rendered by the jury in favor of plaintiff on her age discrimination claim, it is hereby ORDERED, ADJUDGED and DECREED that: defendants' motion for judgment notwithstanding the verdict or for a new trial is denied; that defendants' motion for a remittitur is GRANTED with the jury's verdict for plaintiff being reduced to and judgment being entered in the amount of Thirty-Eight Thousand Eight Hundred Seventeen Dollars and Thirty-Six cents ($38,817.36); that defendants shall respond to plaintiff's motions for prejudgment interest and injunc-

tive relief within ten (10) days from the date of this order; that plaintiff's claims of discrimination under 42 U.S.C. §1983 are dismissed as being barred by the applicable statute of limitations; and that judgment is entered in favor of DEFENDANTS on plaintiff's claims of sex discrimination under Title VII of the 1964 Civil Rights Act.

IT IS SO ORDERED.

Dated this 8th day of September, 1986.

ALICE M. BATCHELDER

Alice M. Batchelder
United States District Judge

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CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERESE A. FARBER,
Plaintiff,

v.

MASSILLON BOARD OF EDUCATION, *et al.*,
Defendants

Case No. C82-1039

Judge Alice M. Batchelder

MEMORANDUM OF OPINION

The within action came on for trial by jury on plaintiffs' claim under the Age Discrimination in Employment Act (A.D.E.A., 29 U.S.C. §§621 *et seq.*), and for trial before the Court on plaintiffs' claims of sex discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e *et seq.*). Following the jury portion of the trial in which plaintiff was awarded damages in the sum of Seventy-Six Thousand Three Hundred Eighty-Three Dollars ($76,383.00), the plaintiff moved for prejudgment interest and the defendants made their alternative motions for judgment notwithstanding the verdict, a new trial and/or a remittitur. The Court and parties agreed following the bench portion of the trial

that all pending matters should be disposed of in one order of the Court. Thus, this Court renders the following opinion and order regarding the plaintiffs' Title VII claim, A.D.E.A. claim and all matters related thereto, and includes the following findings of fact and conclusions of law in support of its ruling.

Facts

Plaintiff Therese A. Farber was born on May 20, 1930, and graduated from St. John's College in Cleveland, Ohio in 1960, with a Bachelor of Science degree in education, and from the University of Notre Dame in 1966, with a Master's degree in education administration. She has been an educator since the early 1950's, has taught in several elementary schools, and served for six years as a parochial school principal. In addition to holding the above mentioned degrees, she holds a permanent teaching certificate, a provisional elementary principal certificate, numerous certificates and commendations for her teaching efforts, and accumulation of over sixty semester hours in post-graduate courses and many hours in various workshops and seminars. In 1972 plaintiff became employed by and still remains with the defendant Massillon Board of Education. She taught grades six through eight at Edmund A. Jones Junior High School until it closed in 1980, moving then to Lorin Andrews Junior High School where she was at the time of trial. She has also taught in, coordinated and directed the Adult Basic Education (A.B.E.) program in Massillon during her years there.

In 1978 there was a vacancy in Massillon for the combined position of Principal of Lincoln Elementary School, Director of the Adult Basic Education program and Director of the Title I Remedial Reading program. Plaintiff applied for the position, but was rejected in

favor of another Massillon teacher, Robert Otte.[1] Otte and plaintiff both possessed the minimum stated qualifications;[2] Superintendent Louis Young offered the position to Otte. Plaintiff subsequently filed a charge with the Equal Employment Opportunity Commission (E.E.O.C.) alleging discrimination by defendant Board of Education on the basis of sex.

In 1979, then-Superintendent Young offered to plaintiff the position of Principal of Emerson Elementary School. Plaintiff, after carefully considering it, decided the offer was too risky as she feared that Emerson

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[1] Plaintiff took pains to attempt to establish that defendants had a policy of promoting from within the Massillon System. This Court does not see the relevance of this issue since plaintiff Farber was within the system. Hence, a resolution of the conflicting testimony is not found to be necessary.

[2] The minimum qualifications as set forth in the Board Policy Handbook and as published in the Notice of Administrative Job Opening on May 23, 1978 for the Lincoln Principalship were:

1. At least four years of successful teaching experience preferably on the elementary school level.
2. At least a Master's Degree and preferably additional graduate hours beyond the MA.
3. Presently holds or is eligible to hold the Elementary Principal's certificate.
4. Elementary Administrative experience desired but not required.
5. An ability in human relations so that the administrator works well with pupils, teachers, other school employees, parents, State Department of Education personnel and others in the community.

At the time Otte was hired he had taught the 6th grade at Gorell Elementary School (in the Massillon system) for a total of eight years, had one year of prior administrative experience as the interim appointee during the 1977-1978 school year, held a Master's Degree from the University of Akron and 4-year Provisional Elementary Teacher's and Principal's Certificates.

would soon be closed by the Board of Education. Since Young refused to make the appointment on an interim basis, plaintiff rejected the offer of the Emerson principalship, despite the evidence that the Emerson position paid more than the previous combined position for which she had been rejected in 1978.[3]

In 1980 Superintendent Young resigned following a long illness during which he had been unable to fulfill his duties as Superintendent. Darrell Cheyney, the Director of Instruction for the Massillon City Schools and the only city school administrator possessing a superintendents' certificate, was appointed Interim Superintendent, and then Superintendent. Plaintiff was among the thirty-two to thirty-four applicants and one of only two female applicants from within the Massillon system, for Cheyney's former position, Director of Instruction. Plaintiff was one of the four finalists for Director of Instruction, but the position went to a younger male, James Gides. Gides was chosen, in part, because he was in the process of securing a city superintendents' certificate, something which Cheyney testified he felt was important for the Director of Instruction in light of the situation which had existed during former Superintendent Young's illness. Upset with the Board's rejection of her again for an administrative position, plaintiff filed another charge with the E.E.O.C., this time alleging sex and age discrimination against the Massillon Board of Education.

The E.E.O.C. determined that it would not proceed with either of Farber's claims and issued her right to sue

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[3] The Emerson principalship paid in excess of Twenty Thousand Dollars for 1979-1980, whereas the combined Lincoln principalship, Title I and A.B.E. directorship position paid slightly more than Nineteen Thousand Dollars for 1979-1980. See, Defendants' Exhibits 5002-5004 and Plaintiff's Exhibit 150.

letters for both charges. Plaintiff subsequently filed suit in this Court against the Massillon Board of Education, the individual members of the Board at the time of the suit, Darrell Cheyney and Louis Young,[4] alleging a violation of her rights under the Age Discrimination in Employment Act (29 U.S.C. §§621 et seq.), Title VII of the 1964 Civil Rights Act (42 U.S.C. §§2000e et seq.) and the Civil Rights Act of 1871 (42 U.S.C. §1983), for the two specific actions complained of in her E.E.O.C. charges and for the defendants' continuing exclusion of women in administrative positions in the Massillon School System. The Title VII claims were the only count of the Complaint which were tried before this court.[5]

I. SEX DISCRIMINATION UNDER TITLE VII

In a Title VII sex discrimination action the initial burden is on the plaintiff to establish by a preponderance of the evidence a prima facie case of sex discrimination. If this is accomplished, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action, which showing shifts the burden back to the plaintiff to prove, by a preponderance of the evidence, that the legitimate reason articulated by the defendant for its action was merely a pretext for the discriminatory action. If the plaintiff is

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[4] The issue of the timeliness of plaintiff's charge with the E.E.O.C. and the subsequent suit in this Court was determined in plaintiff's favor prior to the start of the jury portion of the trial on the A.D.E.A. claim.

[5] As previously indicated, the claim under 29 U.S.C. §§621 et seq. (A.D.E.A.) went before a jury and a verdict was returned for the plaintiff. The §1983 claims were dismissed by this Court prior to the jury portion of the trial on the basis of the Sixth Circuit's decision in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *appeal pending*.

proceeding on a disparate treatment theory, i.e., plaintiff claims that defendant intentionally discriminated against her on the basis of sex, she can establish a prima facie case by showing by a preponderance that: 1) she belongs to a protected minority; 2) she was a qualified applicant for a position for which the defendant was seeking applicants; 3) she was rejected for the position; and 4) after she was rejected, defendant continued to seek applicants or hired someone with similar or lesser qualifications from a nonprotected group. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 240 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Miller v. WFLI Radio, Inc.*, 687 F.2d 136 (6th Cir. 1982). If plaintiff is proceeding on a disparate impact theory, i.e., plaintiff challenges employment practices which are facially neutral but in fact treat certain groups more harshly than other groups, she may establish a prima facie case of sex discrimination by showing by a preponderance of the evidence specific practices or a pattern of practices by the defendant which operate to exclude prospective applicants on the basis of sex. The motive or intent of the employer is not relevant for a disparate impact claim and the employer rebuts the presumption which arises when a prima facie case is established by showing that there is a business necessity for the alleged discriminating employment practices. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, n. 15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, __U.S.__, 105 S.Ct. 2357 (1985). Despite the shifting of the burden to the defendant to rebut the presumption of discrimination which arises upon the showing by plaintiff of a prima facie case, the plaintiff always retains the burden of persuasion. *Texas Dept. of Community Affairs v. Burdine*, *supra*.

In the matter at bar the plaintiff has clearly made out by a preponderance of the evidence a prima facie case of disparate treatment under Title VII, and defendants have articulated legitimate, nondiscriminatory reasons for not hiring plaintiff for the Lincoln School et al. position in 1978 and the Director of Instruction position in 1980. The evidence reveals that in 1978 Robert Otte was chosen over plaintiff mostly because of his greater number of years of seniority.[6] In regard to the events of 1980, Superintendent Darrell Cheyney testified that James Gides was chosen instead of plaintiff for the position of Director of Instruction because of subjective reasons; i.e., Cheyney liked the "chemistry" he had with Gides and believed that Gides would do the better job. The Court finds that defendants made a sufficient showing for both of the claims in question to rebut the presumption of discrimination and shift the burden back to the plaintiff.

With regard to a theory of disparate impact, this Court does not believe that plaintiff has made a showing by a preponderance of the evidence that defendants engaged in facially neutral employment practices which operated to the detriment of women. Plaintiff attempted to show that defendants fostered a hostile work enviroment by permitting alleged "sexist" activities to proceed on school property.[7] While this Court recognizes that a

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[6] Louis Young, the Superintendent and person in charge of hiring in 1978, has since died, and no testimony from him was presented. The evidence surrounding the 1978 charge is largely documentary. *See*, Plaintiff's Exhibits 33-38 and 43.

[7] Plaintiff showed that a "men's club" catered "meals" at which a "penis apron" was exhibited and lascivious gifts were presented to faculty members; that one of the coaches displayed a "Dallas Cowboy Cheerleader" poster in his classroom; and that one of the coaches dressed in "drag" for a school rally.

hostile work environment can constitute a claim under Title VII, *Meritor Savings Bank v. Vinson*, No. 84-1979, slip opinion, (U.S. S. Ct. June 19, 1986), the plaintiff must make a causal connection between the alleged hostile environment, the conditions of employment and the defendants in order to establish sexual discrimination, *Barrett v. Omaha National Bank*, 706 F.2d 424 (8th Cir. 1984); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). This Court notes that the alleged "hostile" activities of defendants were certainly done in poor taste, but fails to find any nexus between the various "sexist" activities and the hiring decisions of the Massillon Public Schools. This Court further notes that many of the events complained of took place after 1980 when the plaintiff had already lost the two positions in question, and that there was scant evidence from which this Court could find that the named defendants recognized, supported, attended or had knowledge of the alleged hostile affairs.[8] *Id.; see also, Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).[9]

The Court also finds that plaintiff did not establish a prima facie case of sexual discrimination through the

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[8] Superintendent Cheyney testified that he never attended the men's club activities and had no knowledge of them. Coach Laverne Hose testified that school funds were not used for the men's club; the cheerleader poster was given him by a female student and that he took it down when so requested; and that he dressed in drag at a school rally upon the request of the school cheerleaders who assisted in designing the costume.

[9] This Court must note that at the conclusion of trial it received a letter signed by a great many, if not all, of the female teachers at Lorin Andrews Junior High School indicating that the men's club activities in no way offended them. This letter, while an improper communication to the Court, was not sent with the consent or knowledge of defense counsel and in no way altered or affected the Court's opinion or impacted on it in any way.

use of historical or statistical data.[10] Plaintiff attempted to and did make some showing of an over-abundance of males as compared to females in the Massillon School System over the last many years. Plaintiff did not, however, make any attempt to provide the court with useful statistics in light of the facts and circumstances surrounding this case.[11] It has not been shown, for instance, how many qualified female applicants there have been over the years for the male dominated positions. Plaintiff cannot show disparate treatment or impact by merely evidencing the vast number of men working in the school system without comparing that number to the total population, by sex, of applicants for the various positions. *See e.g., Hazlewood School District v. United States*, 433 U.S. 299 (1977); *March v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981).

This Court having found that plaintiff did establish a prima facie case of sex discrimination under a disparate treatment theory which was rebutted by defend-

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[10] Historical and/or statistical data may be used to establish a prima facie case of sex discrimination under either a disparate impact or treatment theory. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, __U.S.__, 105 S.Ct. 2357 (1985); *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982) *cert. denied*, 460 U.S. 1083 (1983); *E.E.O.C. v. Ball Corp.*, 661 F.2d 531 (6th Cir. 1981).

[11] As two examples, a former female teacher in the System, Mary Nosis, has held a principal's certificate since 1947, but indicated that she had no interest in an administrative position, and plaintiff herself rejected an offer of an elementary school principalship in 1979. Thus, to fully understand the impact of a male-dominated system any historical/statistical data must include the number of females who applied for positions and the number who rejected offers of employment.

ants,[12] I must now go on to consider wether plaintiff carried the ultimate burden of establishing, by a preponderance of the evidence, sex discrimination on the part of defendants in their refusal to hire or promote plaintiff in 1978 and 1980. Plaintiff can succeed in this either directly with affirmative evidence of discrimination or indirectly by showing that defendants' proffered explanation is unworthy of credence. *Texas Dept. of Community Affairs v. Burdine, supra; Miller v. WFLI Radio, Inc., supra.* I find that plaintiff has not shown either and has failed in her ultimate burden of persuading this Court that she was discriminated against on the basis of her sex.

The ultimate burden a plaintiff carries in a Title VII case is proving that she was discriminated against on the basis of race, color, religion, sex or national origin. *Frunco Construction Corp. v. Walters*, 438 U.S. 567 (1978); *Teamsters v. United States, supra.* In the matter at hand plaintiff has shown that the Massillon School System is heavily populated with male staff members, some of whom engage in lewd behavior, but she has not established that her failure to obtain the appointments she sought in 1978 and 1980 was because of her sex. Plaintiff herself testified that she was concerned about the number of women qualified for administrative positions in the Massillon system who were only "teaching," and that she concluded only after pondering this fact that sex discrimination existed in Massillon. A former female teacher in the system for forty-four years, Mary

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[12] This Court finds that the defendants have articulated sufficient business necessity to rebut the presumption which would have arisen had plaintiff established a prima facie case under a disparate impact theory. Hence, if plaintiff had made a prima facie showing of disparate impact, the ensuing discussion on plaintiff's ultimate burden is applicable.

Nosis, concluded that she was never discriminated against on the basis of her sex and she did not personally know of anyone at Massillon who has been discriminated against on the basis of sex. Deposition at 8-9. Board members Crofut and Swan testified that sex was not a factor they considered in making their hiring decisions. The only testimony elicited during the course of either the bench or jury trial which would suggest that defendants used sex as a hiring criterion came from plaintiff and her spouse.[13] The Court does not find that the opinion of Mr. and Mrs. Farber as to the actual state of affairs in Massillon is sufficient to establish a case of sex discrimination under Title VII.

The Court also finds that the proffered opinions of plaintiff and her spouse do not find support in the documentary evidence submitted at trial. There is no question that plaintiff, on paper, met and exceeded the minimum requirements established by the Massillon Board of Education for the 1978 and 1980 vacancies. Exceeding the minimum requirements, however, does not mandate that an applicant will be chosen to fill an opening for which others meeting the minimum qualifications have applied. In 1978 Robert Otte, a male with qualifications comparable to plaintiff's, competed with plaintiff for the combined Principal of Lincoln, Director of A.B.E. and Title I position. Otte was awarded the position by then Superintendent Young on the basis of his greater experience/seniority in the System. The decision was upheld by the School Board in an independent evaluation and vote. The record is devoid of evidence to support plaintiff's conclusion that she was denied that position because of her sex.

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[13] Upon agreement of the parties the record of the jury trial was incorporated into the bench trial insofar as it was relevant.

In 1980 James Gides, a younger male who met the minimum established qualifications,[14] competed with plaintiff for the Director of Instruction position. The position was awarded to Gides over plaintiff and other candidates who exceeded the minimum requirements because Gides met certain identifiable and unidentifiable subjective criteria desired by Cheyney.[15] While subjective criteria may provide ready mechanisms for discrimination and are thus subject to close scrutiny, they are not *per se* impermissible and may be used if not simply tools to disguise discriminatory action. *See, Grano v. Dept. of Development of City of Columbus*, 699 F.2d 836 (6th Cir. 1983). The Court finds that the additional criteria were properly considered by the defendants in evaluating the candidates for Director of Instruction, as the qualifications established by the Board were only the "minimum" necessary for an appli-

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[14] There is a dispute over whether Gides met the stated qualification of five years teaching and two years administrative experience (Board Policy 2.350, Plaintiff's Exhibit 9) since he served as a teacher from 1971-1974 and as an assistant principal from 1974-1980. Since Superintendent Cheyney in 1980 was satisfied, in his interpretation of the necessary criteria, that the extra administrative experience made up for the lack of five years in the classroom, and this decision was ratified in an independent evaluation and vote by the School Board, this Court finds that Gides did meet the minimum requirements desired by the Board.

[15] The objectively identifiable criteria possessed by Gides and not by the plaintiff were his Ph.D. and superintendents' certificate work. Plaintiff argues that in considering these and anything else outside of the minimums stated in the published Board policy Cheyney acted improperly. Plaintiff is arguing, in essence, that only the "minimum" qualifications should have been considered with the job going to the applicant who most exceeds them. As will be pointed out in the ensuing discussion, this argument is faulty as it does not allow for the consideration of permissible subjective factors.

cant to possess. In a position oriented toward and demanding human interaction, independence, discretion, social skills and much time, subjective factors, however suspect, necessarily play an important role in the evaluation of prospective school administrators. Superintendent Cheyney, and the Board through their adoption of his recommendation, felt that a superintendent's certificate and Ph.D. work were, while not essential, beneficial to a Director of Instruction. In the absence of a showing by plaintiff that any of the criteria beyond the stated minimum requirements which the Superintendent and Board considered were not related to the position sought, this Court finds no evidence of discrimination by defendants against plaintiff in her vying for the position of Director of Instruction in 1980.[16]

A. DAMAGES

The Court having found for defendants on both the 1978 and 1980 Sex discrimination claims by plaintiff, there is no award of damages to be made. The parties have briefed the issue of damages however, and the Court thus feels constrained to make the following observations.

The parties differ on three points, the tolling of the back pay period on the 1978 claim following the offer to plaintiff of the Emerson principalship in 1979, the question of whether her position with the Adult Basic Education program would have necessitated a reduced damage award, and the question of where on the admin-

[16] The Court would also note that another finalist for the position of Director of Instruction, Cliff Wilson, had a Ph.D., a superintendent's certificate and more experience than Gides. Hence, as Cheyney testified, Gides was the best overall candidate and was not chosen on the basis of a single factor and most particularly not on the basis of his gender.

istrative salary scale plaintiff would have started had she been appointed to either job. The Supreme Court in *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982), indicated that a Title VII claimant has the duty to mitigate damages and, therefore, an unconditional offer of the same or substantially equivalent job will toll the running of the back pay period on a prior discrimination claim. Hence, the evidence indicating that the Emerson position was substantially similar to the combined Lincoln position and that plaintiff, for personal reasons, rejected the offer of the Emerson principalship in 1979, any award of back pay under the 1978 claim would have to be appropriately reduced.

In regard to the plaintiff's "moonlighting" with the A.B.E. program, the issue is whether she could have held the Lincoln et al. position or Director of Instruction position and still continued all of her duties with the A.B.E. program. If plaintiff could not have continued to perform her A.B.E. duties had she obtained either of the two desired positions in 1978 or 1980, the A.B.E. position would be classified as "interim" and her earnings from such would have to be taken into account in back pay calculations. *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). This Court finds that the evidence is insufficient to establish that plaintiff could have performed all of the Lincoln et al. duties while continuing to perform all of her A.B.E. activities, but that the evidence is clear and sufficient that plaintiff could not have performed all of her A.B.E. duties had she been the Massillon Director of Instruction.[17] Hence, any back pay award would have to be adjusted accordingly.

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[17] This will be more fully explored in the discussion on defendants' motion for a remittitur of the jury verdict.

The last damage issue the Court wishes to address is the administrative salary scale. Plaintiff's testimony and exhibits all assumed that, had she been appointed to the Lincoln et al. or Director of Instruction positions, she would have started at the highest step of the administrative salary scale due to her many years of teaching experience. In fact, the evidence surrounding the administrative salary scale indicated that, had plaintiff received either of the two positions vied for in 1978 and 1980, she would have been placed at step zero and elevated one step following each year of administrative work until she reached the highest level, step ten. Thus, any award of back pay must reflect the fact that plaintiff would not have begun at the maximum salary for administrators.

B. LIABILITY OF THE INDIVIDUAL BOARD MEMBERS

The individual School Board members, some of whom were not even on the Board during the years in question, have moved to have the claims against them in their individual capacities dismissed as they were not mentioned in the plaintiff's E.E.O.C. filings. Although this issue has been rendered moot by the ultimate holding on the sex discrimination claims, the motion will be granted. A party not named in an E.E.O.C. charge may not be sued under Title VII unless there is an identity of interest with the named party. *Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083 (6th Cir. 1984); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). While this Court recognizes the identity of interest between a school board and its members, in the matter at bar there is little such identity between the 1978 and 1980 Massillon Boards and the named Board members in their individual capacities. This finding is

buttressed by the testimony of some of the members who were not previously aware of plaintiff's specific charges. The Court therefore dismisses plaintiff's complaint of sex discrimination against the Board members in their individual capacities.[18]

II. DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OR NEW TRIAL OR REMITTITUR

Following the jury portion of the trial in which judgment was rendered for the plaintiff on her age discrimination claim in the amount of Seventy-Six Thousand Three Hundred Eighty-Three Dollars ($76,383.00), defendants made their motion for a judgment notwithstanding the verdict or in the alternative a new trial or remittitur. Upon considering the evidence presented in the light most favorable to the plaintiff, *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983), this Court finds that a reasonable trier of fact could reach more than one conclusion and that the jury's verdict that the plaintiff was discriminated against on the basis of her age is sufficiently supported by the evidence. The Court will not, therefore, set aside the verdict reached by the duly impaneled and sworn jury, and the defendants' motion for judgment notwithstanding the verdict or in the alternative a new trial is denied.

In regards to the request for a remittitur, however, this Court finds itself in agreement that the judgment was excessive in light of the evidence presented and must be reduced. Specifically, this Court finds that the evidence clearly shows that plaintiff could not have continued all of her A.B.E. program duties and held the

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[18] The Court previously granted a directed verdict in favor of the individual Board members on plaintiff's 1980 age discrimination claim.

position of Director of Instruction. Plaintiff has been working in the A.B.E. program as a director, recruiter, teacher and aide. The evidence is not unequivocal on the question of whether plaintiff could have performed as an A.B.E. director, recruiter and aide, but it does demonstrate that plaintiff could not have continued as an A.B.E. teacher if she had been appointed the Director of Instruction. Hence, the A.B.E. teaching position was "interim" employment and those earnings must be subtracted from the jury's verdict. *Thornton v. East Texas Motor Freight, supra; Bingo v. Roadway Express, Inc., supra.*

The Court also finds that the verdict must be further reduced as it is obviously based on plaintiff's damage calculations which assumed she would have begun as Director of Instruction at the maximum salary for administrators. This Court finds that the evidence before the jury in the A.D.E.A. action, much like the evidence before the Court in the Title VII action, was insufficient to establish that plaintiff, had she been appointed Director of Instruction, would have begun at step ten of the administrative salary scale. Thus, the verdict must be reduced to allow for a beginning salary in 1980 at step zero, with a step increase in each subsequent year.

Accordingly, the verdict of Seventy-Six Thousand Three Hundred Eighty-Three Dollars ($76,383.00) is reduced by Twenty-One Thousand Eight Hundred Twelve Dollars and Sixty-Four Cents ($21,812.64) [the amount plaintiff earned as an A.B.E. teacher for the 1980-1986 school years] and by Fifteen Thousand Seven Hundred Fifty-Three Dollars ($15,753.00) [the difference between the salary of a person starting at step zero of the administrative scale in 1980 and one starting at step ten], for a total remittitur of Thirty-Seven Thou-

sand Five Hundred Sixty-Five Dollars and Sixty-Four Cents ($37,565.64) and a final verdict of Thirty-Eight Thousand Eight Hundred Seventeen Dollars and Thirty-Six Cents ($38,817.36).

III. PLAINTIFF'S MOTIONS FOR INJUNCTIVE RELIEF AND PREJUDGMENT INTEREST

Plaintiff filed two motions with the Court following the jury's verdict. One seeks prejudgment interest and the other an order mandating that defendants appoint her to an administrative position or give her front pay equal to the administrative salary scale. Defendants subsequent thereto requested that this Court stay disposition of those motions pending a decision on their motion for a judgment N.O.V. or new trial. The Court granted defendants' motion to stay and hence, will not rule on plaintiff's two equitable relief motions until defendants have had the opportunity to brief the issues.

Accordingly, defendants have ten (10) days from the date of this order to respond to plaintiff's motions for injunctive relief and prejudgment interest.

Judgment is hereby entered in accordance with this memorandum of opinion.

IT IS SO ORDERED.

Dated this 8th day of September, 1986.

ALICE M. BATCHELDER
Alice M. Batchelder
United States District Judge

FILED
1987 OCT 13 PM 3:28
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERESE A. FARBER,
Plaintiff,

v.

MASSILLON BOARD OF EDUCATION, *et al.*,
Defendants

Case No. C82-1039

Judge Alice M. Batchelder

ORDER

Plaintiff in this case has moved, post-trial, for equitable relief in the form of pre-judgment interest, front pay and an order requiring that she be appointed by the defendant school board to an administrative position comparable to the one she was denied. Subsequent to the filing of these motions the Court entered its opinion and judgment on the Title VII claim in favor of the defendants, and thus the motions for equitable relief are applicable only to the ADEA portion of this action, in which the jury rendered a verdict for the plaintiff. For the reasons which follow, the Court finds that such relief is not appropriate and the motions are denied.

PRE-JUDGMENT INTEREST

The motion for pre-judgment interest, having been filed more than ten (10) days after entry of judgment in the ADEA action, is barred by Rule 59(e) of the Federal Rules of Civil Procedure and is therefore denied. *Goodman v. Heublein Inc.*, 682 F.2d 44 (2nd Cir. 1982.)

APPOINTMENT TO ADMINISTRATIVE POSITION

The Court finds that the evidence which came before the Court in this case clearly established that there has long been an atmosphere of distrust, suspicion and hostility existing in the relationship between the plaintiff and the administrators of the Massillon School District, such that the granting of plaintiff's motion for an order requiring the Massillon Board of Education to place plaintiff in an administrative position in the Central Office would have a negative effect upon the operation of that office and would be inappropriate. The Court makes this finding solely on the basis of the evidence presented at trial, and not on the basis of the evidentiary materials submitted by defendants in support of their brief in opposition to plaintiff's motion.

The motion for an order requiring the appointment of plaintiff to an administrative position in the central office is accordingly denied.

FRONT PAY

Finally, under the circumstances of this case, the Court finds that an award of front pay in lieu of an administrative position in the Central Office of the Massillon School District is not appropriate. From the evidence presented, I am persuaded that an award of front pay would be largely speculative, particularly in light of the lack of evidence that any Central Office

contract to which plaintiff might have been a party would have been for any period in excess of one year. The award of damages by the jury in this case suffices to make plaintiff whole, and the motion for an award of front pay is accordingly denied.

IT IS SO ORDERED.

Dated this 13th day of October, 1987.

ALICE M. BATCHELDER

Alice M. Batchelder
United States District Judge

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NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THERESE A. FARBER,
Plaintiff,

v.

MASSILLON BOARD OF EDUCATION, *et al.*,
Defendants

Case No. C82-1039

Judge Alice M. Batchelder

ORDER

This matter having come on for consideration on the motion of the plaintiff for attorney fees and the "Statement" filed subsequent to the filing of that motion, and a decision having been rendered in the attached Memorandum of Decision, it is hereby ORDERED that for the reasons stated therein the Court makes the following award of fees:

Leonard Lybarger	
150 hours @ $135 hour	$20,250.00
Thomas L. Johnson	
43.75 hours @ $125 hour	$ 5,468.75
Paralegal fees	
6.5 hours @ $45 hour	$ 292.50
TOTAL FEE AWARD	$26,011.25

The Massillon Board of Education is hereby ordered to remit the amount of $26,011.25 to Leonard Lybarger and Thomas L. Johnson forthwith.

IT IS SO ORDERED.

Dated this 25th day of April, 1989.

ALICE M. BATCHELDER

Alice M. Batchelder
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

THERESE A. FARBER,
Plaintiff-Appellant

v.

MASSILLON BOARD OF EDUCATION,
Defendants-Appellees.

No. 87-4035

APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR REHEARING EN BANC

Now comes the plaintiff-appellant, Therese A. Farber, by her attorney and herewith makes her response to section II B of the Motion for Rehearing En Banc filed by appellee, Massillon Board of Education (dealing with the remand regarding the denial of the principalship of Lincoln Elementary School to the appellant in 1978).

Appellant admits that since she filed her Complaint regarding the denials of her Section 1983 rights on April 15, 1982, she would not presently be able to seek separate redress for the denial by the appellee-board of her civil rights in 1978. Appellant stipulates that she will not seek compensation for the denial of the principalship of Lincoln Elementary School in 1978 during the remand trial regarding her Section 1983 losses.

This should not, however, preclude the appellant from being able to present during her case in chief the events surrounding the 1978 and earlier refusals of the Board of appointing her to an administrative position, as she repeatedly had requested. The continuing refusals of the Board to appoint the appellant to any administrative position from the time she first asked (1973) to 1980, together with other evidence of intentional dis-

crimination against female teachers on account of their sex, would confirm the intentional nature of the Board's actions. Hence, evidence of the Board's intentional discrimination against Farber in 1978, as has now been determined for purposes of Title VII, while not separately compensable under Section 1983, would have evidentiary value in proving that the Board was motivated by the same unlawful intent when it denied appellant appointment to the position of Director of Instruction in 1980.

Respectfully submitted,

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Attorney for plaintiff-appellant,
Therese A. Farber

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Response of Appellant to Appellees' Motion for Rehearing En Banc was mailed this 10th day of September, 1990 by regular first class U.S. mail, postage prepaid, to Ms. Carolyn K. Semour, Esq. and Mr. Ronald J. James, Esq., Squire, Sanders & Dempsey, 1800 Huntington Bank Building, Cleveland, Ohio 44115, as attorneys for the defendant-appellee, Massillon Board of Education.

Respectfully submitted,

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FILED
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LEONARD GREEN, Clerk

No. 87-4035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERESE A. FARBER,
Plaintiff-Appellant,

v.

MASSILLON BOARD OF EDUCATION OF THE MASSILLON CITY SCHOOL DISTRICT, *et al.*,
Defendants-Appellees

ORDER

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and TAYLOR*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

* Hon. Anna Diggs Taylor sitting by designation from the Eastern District of Michigan.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN

Leonard Green, Clerk

A-52

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

VS.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings by reversing a judgment for defendant and remanding a claim for trial, even after plaintiff *expressly conceded* that any error the trial court committed by applying the wrong limitations period was harmless, because the applicable statute of limitations still bars this particular claim?

II. When a Title VII claim improperly is tried to the court before a parallel §1983 claim is tried to a jury, the trial court's judgment for defendant (on the Title VII claim) must be vacated, to avoid collaterally estopping the jury and depriving plaintiff of her jury trial right on the §1983 claim. *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331. Isn't it a necessary corollary that the Court of Appeals *cannot reverse* the Title VII verdict and enter judgment for plaintiff, thereby collaterally estopping the jury and violating *defendant's* Seventh Amendment right to jury trial of the §1983 claim, but rather *must vacate* the Title VII judgment and let a jury decide all relevant issues *de novo*?

III. When a trial court errs by entering a "forced" remittitur, instead of offering plaintiff a choice between remittitur and a new trial, does not proper appellate procedure require a *remand* so the trial court can offer plaintiff this choice, not outright *reversal* of the remittitur, which penalizes defendant for the trial court's procedural error?

IV. Did the Court of Appeals err by decreeing that certain equitable remedies, prejudgment interest and front pay, are virtually mandatory in age discrimination cases, a position contrary to that of other circuits and other panels of the Sixth Circuit, who regard such remedies as discretionary under 29 U.S.C. §626(b)?

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No. 90-620

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

VS.

THERESE A. FARBER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent
Therese A. Farber

QUESTION PRESENTED

I. Does the Supreme Court have jurisdiction to decide the Petition for a Writ of Certiorari presently pending before the Court as filed by the Petitioner, Massillon Board of Education?

Supreme Court, U.S.
FILED
MAY 30 1991
OFFICE OF THE CLERK

(2)

No. 90-1423

IN THE

Supreme Court of the United States

October Term, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. When a Title VII claim is improperly tried to the court before a parallel §1983 claim is tried to a jury and the trial court's judgment for the defendant on the Title VII claim is vacated, as required by *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331 (1990), may not the Court of Appeals reverse and enter judgment for the plaintiff on the Title VII claim where the *undisputed* evidence (not appealed) shows that the defendant appointed a male candidate who did not possess the minimum stated qualifications, thereby being unable as a matter of law to articulate a nondiscriminatory reason for its action?

II. May an appellate court reinstate a verdict for a plaintiff which is within the range of damage evidence presented by the plaintiff where the trial court erroneously forces the plaintiff to accept a remittitur, rather than remanding to require the court to offer plaintiff a choice of the remitted verdict or a new trial on the issue of damages?

III. Did the Court of Appeals err by stating that certain equitable remedies, prejudgment interest and front pay, are *presumed* appropriate for a plaintiff who prevails on an employment discrimination claim?

PARTIES

The parties have been properly identified by the Petitioner.

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PARTIES i

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No. 90-1423

IN THE

Supreme Court of the United States

October Term, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays this Court to deny for lack of substantial federal question the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, filed December 11, 1990.[1]

[1] The filing of Respondent's Brief in Opposition was delayed at Respondent's request due to the ongoing settlement negotiations between the parties. These discussions are continuing. In the event a settlement is entered into which would render moot the issues presented to this Court, counsel for Respondent will immediately notify the Clerk of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals, dated December 11, 1990, is reported at 917 F.2d 1391 and is included in Petitioner's Appendix (pp. A1 to A19). This opinion is being deemed for purposes of this appeal as the same as the Sixth Circuit's first opinion, dated July 12, 1990, which was vacated by the December 11, 1990 order and opinion.

STATEMENT OF THE CASE

Facts[1] and Proceedings Below

Two important facts have been omitted by the defendant. The first is that the Court of Appeals found with respect to plaintiff's 1978 Title VII claim (denial of a principalship, *et al.*), that "[o]n the stipulated evidence, Otte [the successful male candidate] lacked the minimum stated qualifications for the position . . ." and had been chosen on the alleged ground of system seniority—a qualification not stated in either "the Board Handbook or the administration's posting." Petitioner's App., p. A11. The appellate court concluded that

> [t]he reasons offered are transparently pretextual, and appear to have been tailored to the needs of the occasion. Neither Appellee nor the district court has presented any examination of the validity of the putative criteria upon which the decision allegedly was made, and no rational basis presents itself from the record. They cannot, on their face, be called legitimate non-discriminatory reasons for an otherwise discriminatory decision.

Ibid. Accordingly, it reversed without remand the trial court's judgment.

The second fact omitted by defendant concerns plaintiff's 1980 Title VII claim—denial of the central office Director of Instruction position. The Court of Appeals again concluded that plaintiff had "established a prima facie case which the Board could not rebut with a legitimate non-discriminatory reason for its decision." *Ibid.*, at p. 13. The successful applicant, James Gides—a young male—also lacked the minimum stated

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[1] Although defendant is not asking this Court to review the factual determinations made below (Petition, p. 4, n.1), plaintiff believes that a brief statement of additional facts is necessary for a proper understanding of the Court of Appeals' decision.

requirements for the position, which requirements had not been waived by the Board. Under such circumstances the Court of Appeals concluded that defendant could not use the subjective criterion offered by the Superintendent, the good "chemistry" between himself and Gides, "to distinguish among peers"—that is, between candidates having substantially equal qualifications, *Ibid.* Because the trial court's reasoning failed to meet the Sixth Circuit's "standards requiring close analysis of subjective criteria," its decision regarding the 1980 Title VII claim was likewise reversed and a final judgment entered for the plaintiff. *Ibid.*, at p. 14.

Defendant has explicitly stated that it is "not asking this Court to review these rulings . . ." Petition, p. 9. Hence, they stand as correct. More importantly, they also constitute undisputed facts and the law of the case upon the remand trial of plaintiff's §1983 claim with respect to the Board's unlawful sex discrimination in 1980.

REASONS FOR DENYING THE WRIT

I. Reversal Of The Title VII Judgment And Entry Of Judgment For The Plaintiff On Her 1980 Claim, Rather Than Vacating The Judgment, Did Not Violate Defendant's Right To Trial By Jury.

Defendant argues that *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990), required the Court of Appeals to remand after reversing the district court's erroneous judgment on plaintiff's 1980 Title VII claim (denial of the Director of Instruction position) in order to preserve defendant's right to have a jury consider whether such denial violated Section 1983. Defendant asserts that unless further proceedings are held on the Title VII claim, the jury hearing the §1983 claim will be collaterally estopped from finding for the defendant on such claim. Petition, pp. 11-15.

While agreeing that such a result would normally be required, plaintiff believes the evidence in the present case dictates a different result because upon remand of the §1983 claim the trial court will be required to grant plaintiff either a partial summary judgment or a directed verdict on the issue of defendant's liability for having intentionally deprived plaintiff of her civil rights on account of her sex contrary to §1983 in denying her the Director of Instruction position. Although this Court is loathe to accord "collateral estoppel effect to the trial court's factual determinations," preferring to remand "each case in its entirety for a trial before a jury," it should not apply this rule to the *unrebutted* facts in this case which have not been appealed. *Lytle*, 108 L. Ed. 2d, at 516. To do so will only cause further delay and unnecessary waste of judicial resources.

The Court of Appeals' analysis of the undisputed evidence brought out during the Title VII bench trial of plaintiff's 1980 Title VII claim for denial of the Director of Instruction position shows that defendant will not be able to survive a dispositive motion upon in connection with the §1983 remand trial. As discussed at pages 3-4, above, the Sixth Circuit's examination of the Board's written policies concerning the prerequisites for the Director's position

> undisputedly required that the appointee possess a minimum of five years of teaching experience and two years of administrative experience. [Plaintiff] easily met those requirements, and Gides [the appointee] did not. Gides had only three years of teaching experience prior to this appointment as an Assistant Principal . . . in 1974.

Petitioner's App., pp. A10-A11. The court went on to conclude that

> the district court's finding that Gides met the minimum stated requirements for the position, and that the Board had waived its standing qualifications was clearly erroneous.

Ibid., at 11. Continuing, the court found that the plaintiff "*established a prima facie which the Board could not rebut with a legitimate non-discriminatory reason for its decision.*" *Id.*, emphasis added.

Defendant's and the district court's reliance on the subjective factor of good "chemistry" between the male Superintendent and Mr. Gides was rejected as a blatant attempt to continue the tradition of only male administrators in the system's central office. *Id.*, at 12-13. Furthermore, the record evidence disclosed that the Board had never knowingly waived its published requirements for the position. Petitioner's App., p. A13. Gides' undisputed

failure to meet the Board's minimum requirements for the position meant, as a matter of law, that he could not have been equally as qualified as the plaintiff—or even nearly as qualified—to justify the use of the highly questionable, subjective factor of body "chemistry" to make him *more* qualified than the plaintiff.

There is no question that the defendant will not be able to present any evidence during the §1983 remand trial that Gides somehow met the Board's minimum qualifications and was chosen instead of the plaintiff for "a legitimate non-discriminatory reason," as required by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252, 101 S. Ct 1089, 67 L. Ed. 2d 207 (1981). No amount of rearranging or juggling of the evidence during the §1983 remand trial can alter Gides' lack of teaching and administrative experience in 1980. Hence, it would be a waste of time to allow the defendant to go through the motion of presenting such evidence a second time, since the outcome will have to be the same. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 514, 101 L. Ed. 2d 442, 459, 108 S. Ct. 2510 (1988). Even if a jury would somehow erroneously conclude that Gides met the minimum qualifications and that the Superintendent's preference for the "chemistry" between himself and Gides was the reason he was chosen, the court would have to grant plaintiff a judgment notwithstanding a verdict for the defendant due to the defendant's inability to satisfy its evidentiary burden. *Curtis v. Loether*, 415 U.S. 189, 198, 39 L. Ed. 2d 260, 268 (1974). Consequently, the reversal and grant of final judgment by the appellate court on plaintiff's 1980 Title VII claim was correct.

Plaintiff submits that the Court's holding in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S Ct. 645, 58 L. Ed. 2d 552 (1979), should be extended in this case to collaterally estop the defendant's right to a jury trial on the issue of its having discriminated against her in 1980 on account of her sex contrary to §1983. Defendant's exercise of its right to a jury trial on that issue will be a meaningless ritual, since the outcome vis-a-vis its liability will be the same.

II. Reversals With Final Judgment Are Proper On Occasion Where Trial Court Errs By Entering A "Forced" Remittitur.

The Sixth Circuit does not follow a hard and fast rule when confronted by clear error of a trial court in forcing a plaintiff to accept a remittitur. Contrary to defendant' characterization, there is no real "split both among the circuits and within the Sixth Circuit" on the procedure to be followed. Petition, p. 15. Plaintiff submits that the cases cited where the jury's verdict was reinstated in lieu of a remand for a new trial or acceptance of a smaller award can easily be reconciled with those which have remanded for further proceedings. Requiring remands of every improperly remitted jury award would unduly restrict the corrective authority of the courts of appeals and, in many cases, cause a needless continuation of litigation. The present case is a prime example of an instance where justice required reversal and reinstatement of the jury's award, rather than a remand for acceptance of a remitted verdict or a new trial on the issue of damages.

The appellate court held that the trial judge erred in two respects in granting defendant's request for a remittitur. First, it concluded that the district court substituted its judgment as to the extent of plaintiff's

damages for that of the jury, which had weighed the conflicting evidence and chose to award plaintiff the maximum amount of the range of her pay loss. Petitioner's App., p. A4. Secondly, it found that the trial judge erred in forcing the plaintiff to accept a remittitur without giving her the right to a new trial on the issue of damages. Under these circumstances the appellate court reversed and reinstated the verdict, citing *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974) and *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975). Petitioner's App., pp. A4-A5. By so doing, defendant claims that the Sixth Circuit went against clear authority both within and without the Circuit and asks this Court to settle this "question of appellate procedure." Petition, p. 15.

Defendant cites dicta in *Matherne v. Wilson*, 851 F.2d 752, 762 (5th Cir. 1988) (recognizing necessity of remand to allow prevailing party to choose either a new trial or a remitted award) and the decision in *May v. Ellis Trucking Co., Inc.*, 243 F.2d 526, 527 (6th Cir. 1957) (remand of an erroneously forced remittitur) as authority for its position that remand is the only acceptable procedure in every instance of erroneous remittiturs. Petition, p. 15. Defendant then cites *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969, 974 (2nd Cir. 1975) (suggesting remand as the preferred procedure, but nevertheless reversing and reinstating the jury verdict due to "minimal" amount in issue) and *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (6th Cir. 1974) (reversing and reinstating jury award which was within the range of damages received in evidence) to claim the existence of a "split" among the circuits and within the Sixth Circuit itself. Petition, p. 15.

These decisions are hardly evidence of a split of authority necessitating review by this Court, as defendant claims. Petition, p. 16. While citing the general rule requiring remand of erroneous remittiturs, *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988), nevertheless denied plaintiff's request for a remand to choose having a new trial to redetermine his entitlement to "nominal" damages where plaintiff had received actual damages and the trial court should have set aside the entire award of nominal damages rather than merely reducing it. *May v. Ellis Trucking Co., Inc.*, 243 F.2d 526 (6th Cir. 1957), involved a three paragraph *per curiam* decision remanding for reconsideration defendant's motion for new trial which resulted in the trial judge entering a judgment for the plaintiff for $25,000 rather than the $42,000 awarded by the jury, where the verdict "shocked the conscience of the Court." The court of appeals merely noted the trial court's error in ordering a forced remittitur without the option of a new trial and upon remand directed the trial court to grant or deny the motion for a new trial generally or to deny a new trial upon the condition of plaintiff's acceptance of a remitted verdict. There was no discussion of the nature and extent of plaintiff's actual damages or whether, as in the present case, the evidence showed the amount of the verdict to be within the range of proofs received in evidence. *May*, therefore, is hardly authority for the proposition that remands for erroneous remittiturs must be ordered in every case. *Staplin v. Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975), also recognized that remand of erroneous remittiturs is generally required, but reversed and entered a final judgment for the plaintiff because, as here, *the evidence showed the verdict to in fact have been within the range of plaintiff's proofs.* It was this fact, in addition to the small amounts

involved ($3500 versus $2335) and the need to terminate the litigation, that convinced the court not to remand to allow a choice for a new trial. *Staplin* did not adopt a new and different procedural rule for the Second Circuit in remittitur cases. Rather it represents the exercise of appellate discretion to correct error in a fair and efficient manner in order to terminate excessive litigation between the parties.

Brewer v. Uniroyal, Inc., 498 F.2d 973 (6th Cir. 1974), likewise was a case in which the court declined to remand a forced remittitur rather than reinstating the verdict where the evidence showed the jury's award to be "*clearly* within the 'maximum limit of a reasonable range,' " *Brewer*, at 977-978, citing *Manning v. Altec, Inc.*, 488 F.2d 127, at 133 (6th Cir. 1973) (emphasis in original). In such cases, where there is clear evidence to support the jury's award, remand would be superfluous. *Brewer* was not really a departure from existing authority which requires remands in most but not all cases of erroneous remittiturs. Defendant has not shown any significant dichotomy between the Sixth and other circuits or within the Sixth Circuit requiring intervention by this Court.

III. Appellate Courts May Grant Final Relief, Including Appropriate Equitable Remedies Such As Prejudgment Interest And Front Pay, Where The Record Shows Plaintiff Is Clearly Entitled To Such Relief.

Defendant also claims that the Court of Appeals' decision below changed the nature of equitable remedies under the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, from being discretionary to mandatory. Petition, p. 18. Defendant mischaracterizes the decision below.

A. Prejudgment interest

Defendant argues that the Court of Appeals, upon determining that the trial court erroneously denied plaintiff's request for prejudgment interest for the sole reason of having been untimely filed, should have remanded the matter to the district court to redetermine if there are *other* reasons to deny it. *Ibid.*, at 18-19. Defendant wants a second bite at the apple and complains that the appellate court usurped the trial court's rightful discretion. Had there been additional reasons showing plaintiff's lack of entitlement to prejudgment interest, the trial court could and should have stated them. It did not. The adage that to express one thing is to exclude all others, while primarily applied to statutory interpretation, has relevance here. Litigation would never end if what the defendant seeks were granted in all cases. Allowing the trial judge to consider anew and to reject plaintiff's entitlement to prejudment interest for any of the additional reasons originally proffered by the defendant and, presumably rejected by the trial judge, would set in motion a never-ending chain of hearings and appeals. Once the trial court was shown to have declined to exercise its discretion in granting prejudgment interest for alleged untimeliness and for no other reason, it did not constitute an unlawful usurpation of the trial judge's discretion for the Court of Appeals to order the trial court to order the defendant to pay the interest to which plaintiff was entitled, using its discretion in calculating the amount.

B. Front pay

Defendant claims, finally, that when the Court of Appeals stated that "front pay is a remedy presumed appropriate" for the plaintiff, it meant that such relief

was mandatory. Petition, p. 20. Defendant faults the court for citing *Davis v. Combustion Engineering*, 742 F.2d 916, 922-23 (6th Cir. 1984), which declared that "[f]ront pay does not appear to lend itself to a per se rule" and "is neither mandatory nor prohibitied by the Act." While not exactly in point for the proposition stated, *Davis* and other cases do show that front pay is indeed presumed appropriate in most, although not all, cases where the plaintiff has been unlawfully denied appointment to the position in question. Although reinstatement is the preferred remedy for successful plaintiffs in ADEA cases (*Blim v. Western Electric Co.*, 731 F.2d 1473, 1479 (10th Cir.), *cert. denied, sub. nom AT&T Technologies, Inc. v. Blim*, 469 U.S. 87 (1984); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448 (11th Cir.) *cert. denied*, 474 U.S. 1005 (1985)), front pay is generally deemed necessary to adequately compensate the plaintiff for the denied position, except where the employer can prove it would be inappropriate. Such circumstances are few and must be clearly disqualifying. *See, for example: Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985) (front pay may be denied where too speculative to compute or fact that liquidated damages were awarded); *Dillon v. Coles*, 746 F.2d 998, 1006 (3rd Cir. 1984) (front pay denied where evidence shows position no longer in existence—here due to closing of business soon after backpay order); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984) (where plaintiff is shown to have refused reasonable offer of reinstatement); *Bartek v. Redevelopment Authority of Pittsburgh*, 882 F.2d 739, 747 (3rd Cir. 1989) (denied position abolished before trial and no comparable position shown to exist); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1209 (7th Cir. 1989) (employer can

show plaintiff would have been separated in a post-trial reduction-in-force); and *Floca v. Homcare Healthcare Services, Inc.*, 845 F.2d 108, 112 (5th Cir. 1988) (plaintiff voluntarily removed self from job market by entering graduate school).

Plaintiff submits that the court below committed no error necessitating review in describing front pay as a remedy "presumed appropriate" for the plaintiff in this case if, after a proper evidentiary hearing, the trial court finds substantial reasons to deny appointment of the plaintiff to a Central Office administrative position.

CONCLUSION

Certiorari should not be granted in this case. The Court of Appeals properly granted final judgment on both of plaintiff's Title VII claims, as well as finding plaintiff entitled to an order of prejudgment interest, while remanding on the issue of front pay. The court below neither departed from accepted procedure, nor created any split by ignoring circuit precedent. Defendant, moreover, has shown no reason why it should not be collaterally estopped from asserting in the §1983 remand trial a legally insufficient non-discriminatory reason for having chosen a male over the plaintiff in 1980 for the position of Director of Instruction, when that issue has been already decided adverse to the defendant and *no other evidence could be offered to change the successful appointee's lack of minimum qualifications.* Jury trials are not required where undisputed evidence shows that under no set of circumstances could the party seeking a trial succeed if he had a trial. The Seventh Amendment doesn't guarantee "show" trials.

Respectfully submitted,

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United States

OCTOBER TERM, 1990

MASSILLON BOARD OF EDUCATION,
Petitioner,

vs.

THERESE A. FARBER,
Respondent.

PETITIONER'S REPLY BRIEF

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I. The Court Of Appeals Erred In Reversing, Rather Than Simply Vacating, The Trial Court's Judgment, And Contrary To Plaintiff's Claim, That Error Was Not Harmless.

The district court conducted a bench trial on plaintiff's Title VII claims, before holding a jury trial on her parallel §1983 claims.[1] That was improper, because the trial judge's findings collaterally estop any jury which subsequently tries the §1983 claims, thereby depriving the litigants of their right to jury trial. Under *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), the Court of Appeals was required to *vacate* the bench verdict and *remand* for jury trial of the §1983 claims. Instead, the appellate court *reversed* the bench verdict and entered judgment for plaintiff. That creates exactly the same estoppel problem as did the original bench verdict, only now it is defendant (instead of plaintiff) whose right to jury trial is lost through estoppel.

This Court should grant certiorari, then vacate the appellate decision and remand for jury trial of the §1983 claims. Even plaintiff *expressly concedes* "such a result would normally be required." (Respondent's Brief In Opposition, p. 5).

However, plaintiff tries to escape the rule established in *Lytle* by noting that here the appellate court reversed, rather than affirmed, the district court. In plaintiff's view, this renders the failure to remand harmless error, because the same reasoning which led the Court of Appeals to reverse the *judge's* verdict for defendant necessarily would apply to any *jury* verdict for defendant: "Even if a jury would somehow [find for defendant] . . . the [district] court would have to grant

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[1] "Plaintiff" refers to plaintiff-respondent Therese Farber, while "defendant" refers to defendant-petitioner School Board.

plaintiff a judgment notwithstanding [the] verdict." (Respondent's Brief In Opposition, p. 7).

Plaintiff is wrong, because the standard for granting JNOV after a jury verdict is significantly different than the standard for reversing a bench verdict. Just because the Court of Appeals reversed the judge's findings under Fed.R.Civ.P. 52(a), that does *not* automatically mean it could order JNOV under Fed.R.Civ.P. 50(a). A jury verdict for defendant could (and should) stand despite the Court of Appeal's holding below.

JNOV may be granted only when "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the prevailing party]." Proposed Fed.R.Civ.P 50(a).[2] *See also* 9 Wright & Miller, Fed. Prac. & Proc. §2524 (citing numerous cases for the proposition that JNOV is permitted only when the evidence is so overwhelming that "reasonable men" could reach "but one conclusion").

By contrast, Fed.R.Civ.P. 52(a) provides that bench verdicts may be reversed if "clearly erroneous"; i.e., if an appellate court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). An appellate court may find "clear error" even when some competent evidence supports the verdict:

> A finding is "clearly erroneous" when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

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[2] The quoted language from the proposed new rule "effects no change in the existing standard," but simply spells out the standard which "was not expressed in the former rule, but was articulated in long-standing case law." (Advisory Committee Notes).

United States Gypsum Co., 333 U.S. at 395 (emphasis added). Thus, the clear error standard is significantly different than the JNOV standard. One may be "firmly convinced" an error was committed, even though reasonable minds could disagree precluding JNOV.[3]

For this reason, plaintiff is dead wrong when she asserts remand for a jury trial would be futile. The Court of Appeals' finding of "clear error" would have absolutely no bearing on whether a jury verdict for defendant could be upheld, because a jury verdict would be reviewed under an entirely different standard. And by plaintiff's express admission (supra, p. 1), *Lytle* requires that this case be remanded unless remand would be futile.

II. When A Trial Court Procedurally Errs By Entering A Forced Remittitur, Proper Appellate Procedure Requires A Remand, Not A Reversal.

Plaintiff apparently concedes that remand *usually* is the proper remedy to redress a forced remittitur, but then argues, "where there is clear evidence to support the jury's award [i.e., the remittitur was unwarranted], remand would be superfluous." (Brief Of Respondent, p. 11). This argument misses the mark, as defendant previously explained in an argument plaintiff totally ignores. (*See* Petition For A Writ Of Certiorari, pp. 16-17). Rather than repeat that argument here, defendant simply directs the Court's attention to the cited pages in its Petition, particularly the discussion of *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977). Remanding is the *only* way to restore *both* parties to where they would have been, had the trial court not erred proce-

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[3] That is why trial judges often *grant* new trials, based on "clear error," while simultaneously *denying* motions for JNOV.

durally. Otherwise, defendant winds up being penalized by the trial court's procedural error.

III. The Court Of Appeals Erred By Treating Certain Remedies As Mandatory, When The ADEA Expressly Commits Such Remedies To The Discretion Of The Trial Judge.

A. Prejudgment Interest Is Discretionary.

Plaintiff concedes that an award of prejudgment interest lies within the district court's discretion. (Brief Of Respondent, p. 12). However, she notes that the trial court denied her motion "for untimeliness and for no other reason." (*Id*). This, she says, constitutes an *implied* ruling against defendant on all "other" asserted grounds, because "[h]ad there been additional reasons showing plaintiff's lack of entitlement to prejudgment interest, the trial court could and should have stated them." (*Id*).

Plaintiff's argument is a *non-sequitur*, or at best reflects a gross misunderstanding of how trial judges operate in the real world. The district court ruled that plaintiff's motion was not properly before it, due to untimeliness. In those circumstances, the court had no reason to reach the merits of plaintiff's motion. It denied the motion on a procedural ground, without considering the alternative, substantive grounds. Plaintiff's assertion about "implied" rulings on those other issues is a pure fiction.

B. Front Pay Is Discretionary.

The Court of Appeals held that "front pay is a remedy presumed appropriate," citing *Davis v. Combustion Engineering*, 742 F.2d 916 (6th Cir. 1984) as its only authority for this proposition. (Opinion, App. p. A-8). Plaintiff admits *Davis* is "not exactly in point for the

proposition stated." (Brief Of Respondent, p. 13). Plaintiff's concession is a bit understated, since *Davis* stands for exactly the opposite conclusion. *Davis*, 742 F.2d at 922-23 ("Front pay does not appear to lend itself to a per se rule. It is neither mandatory nor prohibited by the Act").

Further, the Brief Of Respondent (pp. 13-14) lists a variety of cases in which front pay was *denied*, based on various factors. Given plaintiff's concession that front pay is *not* presumed appropriate in all cases, the Court of Appeals' contrary view must be rejected.

CONCLUSION

Plaintiff concedes that several aspects of the appellate holding below "normally" would constitute error. But then she makes all kinds of excuses as to why deviation from "normal" appellate procedure was warranted in this supposedly unique case. Or she tries to explain how the deviations, even though erroneous and ordinarily prejudicial, were harmless in this one instance.

This Court should not be misled by plaintiff's weak attempts to excuse the errors below. Errors clearly were committed, and they directly prejudiced defendant. Further, since the *published* appellate decision addresses questions of statutory interpretation, *and* general questions of appellate procedure, it has potential to affect many litigants beyond the parties to the present case.

This Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit, then should vacate and remand the challenged aspects of the decision below.

Respectfully submitted,

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